NO. 86 1814

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS K. PINNER,

Petitioner,

VERSUS

JAMES J. SCHMIDT,
THE SHERWIN-WILLIAMS COMPANY,
and C.B.M. OF LOUISIANA, INC., d/b/a
CREDIT BUREAU SERVICES-NEW ORLEANS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Thomas K. Pinner, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case of December 18, 1986. Petition for Rehearing and Petition for Rehearing En Banc on behalf of petitioner herein were denied on February 10, 1987.

QUESTIONS PRESENTED FOR REVIEW

MUST A PLAINTIFF PROVE MALICE AND EVIL MOTIVE ON THE PART OF A DEFENDANT CREDIT BUREAU AS A PREREQUEESTE TO A FINDING OF A WILLFUL FAILURE TO COMPLY WITH THE FAIR CREDIT REPORTING ACT AND AN AWARD OF PUNITIVE DAMAGES?

WHEN THE FAIR CREDIT REPORTING ACT MAKES THE DEFENDANT CREDIT BUREAU LIABLE FOR REASONABLE ATTORNEY'S FEES IN ANY SUCCESSFUL ACTION TO ENFORCE ANY LIABILITY UNDER THE ACT, DOES THAT MEAN ONLY FOR THOSE HOURS SPENT IN THE TRIAL COURT, WITH NO COMPENSATION FOR THOSE HOURS SPENT IN THE APPELLATE COURTS?

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OPINIONS DELIVERED BELOW

The opinion of the Court of Appeal for the Fifth Circuit (Appendix A) is reported at 805 F.2d 1258. The opinions of the District Court (Appendix A) are reported at 617 F.Supp. 335 and 617 F.Supp. 342.

JURISDICTION OF THIS COURT

The judgment and opinion of the Court of Appeals were entered on December 18, 1986. A Petition for Rehearing and a Petition for Rehearing En Banc filed by the Plaintiff were denied on February 10, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Fair Credit Reporting Act, 15 U.S.C. Sections 1681e(b), 1681h(e), 1681i(a), 1681i(c), and 1681i(d) (Appendix B).

STATEMENT OF THE CASE

To remedy the problem of credit reporting agencies trampling recklessly on the rights and reputations of consumers, Congress passed the Fair Credit Reporting Act, 15 U.S.C. Sections 1681-1681t. This was in 1970. Speaking in favor of the law, Representative Sullivan said:

> " . . . in view of the increasing importance to the individual of having access to insurance as well as the vital necessity of being able to find employment, I believe that the sections of this bill dealing with credit and personal data reporting will have the greatest overall impact. The

reason I say that is that with the trend towards computerization of billings and the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal 'blips' and keypunch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable or uninsurable, as well as deny him the opportunity yo obtain a mortgage or buy a home. We are not nearly as much concerned over the possible mistaken turn-down of a consumer for a luxury item as we are over the possible destruction of his good name without his knowledge and without reason.

The loss of a credit card can, of course, be expensive, but, as Shakespeare said, the loss of one's good name is beyond price and makes one poor indeed. This bill's title VI deals with that problem." 116 Cong. Rec. 36570 (1970), cited in Bryant v. TRW, Inc., C. A. 6th Cir. 1982, 689 F. 2d 72, 79.

This act made it mandatory that whenever a consumer disputes any item of information contained in his file at a credit reporting agency, the agency shall:

(1) clearly note in the consumer's file that it is disputed by the consumer and clearly note the consumer's reasons for the dispute (Section 1681i(c)),

(2) send a revised report showing the dispute and the reasons therefor to any store that has denied credit to the consumer, whenever requested to do so by the consumer (Section 1681i(d)),

(3) reinvestigate the disputed item "using reasonable procedures to secure maximum possi-

ble accuracy of the information it is reporting" concerning the individual (Sections 1681i(a) and 1681e(b)), and

(4) promptly delete this item from the consumer's file if they cannot obtain verification (proof) of the accuracy of the information (Section 1681i(a)).

In October, 1981, plaintiff applied for charge accounts at Goodyear Tire Store and Western Auto Stores. He needed tires for his automobile which he used in his work as a salesman. Plaintiff enjoyed a good reputation. Both stores refused to allow him to open an account because of information they received from the defendant credit bureau. Plaintiff went to the defendant credit bureau and requested a copy of the information they were furnishing to the stores concerning him. He saw that the defendant credit bureau was telling the stores that the plaintiff had an undisputed delinquent account with the Sherwin WIlliams Company in the amount of $193.00 and that said account had been placed for collection.

Along with the copy of his credit report of November 23, 1981, plaintiff received a document entitled, "Understanding Your Credit Report", which said that if you wish to dispute any item on your credit report, you could do so, and you could make a statement of your version of the matter; that your dispute would be noted along with your statement and would be reported each time an inquiry is made for your credit record. The document further said that if you disputed any item, they would send a revised report showing your dispute and your statement of your version of the dispute to any and all consumer credit granting firms that received your report during the last six months. The document further said that if you disputed

any item, the credit bureau would promptly reinvestigate that item, and if the item could not be verified (proved), it would be removed from your file. The defendant credit bureau's document said that all of this would be done in accordance with the Fair Credit Reporting Act.

Plaintiff had his attorney write to the defendant credit bureau on January 11, 1982, informing them that the Sherwin-Williams account was a disputed account; that it consisted of unauthorized charges made on plaintiff's employee account at the Sherwin-Williams Company by a store manager named Jim Schmidt, and if the defendant credit bureau would obtain copies of the charges in question, they would show that Jim Schmidt made the charges. Plaintiff requested them to send a revised report to the Western Auto Stores showing his dispute and his statement of the reasons therefor. He further requested that they remove this item from his credit file if they could not obtain verification (proof).

In February, 1982, plaintiff was denied charge accounts by D. H. Holmes Co., Ltd., a leading department store in New Orleans, by Danny's Clothing Store, and by Sears & Roebuck. All three stores informed plaintiff that they were denying him credit based on information that they were furnished by the defendant credit bureau.

Again, plaintiff went to the defendant credit bureau and obtained a copy of his credit report. This one was dated March 31, 1982. Plaintiff saw that the defendant credit bureau was still reporting that he had an undisputed delinquent account with the Sherwin-Williams Company and that said account had been placed for collection. It did not show the plaintiff's dispute and his statement as to the reasons for the dispute.

This suit was filed on March 15, 1983. It alleged that the defendant credit bureau willfully failed to comply with the mandatory requirements of the Fair Credit Reporting Act and was liable to the plaintiff in an amount equal to the sum of any actual damages sustained by the plaintiff as a result of their failures, such amount of punitive damages as the court may allow, costs of the suit, together with attorney's fees as determined by the court. A year after suit was filed, plaintiff obtained a third copy of his credit report from the defendant credit bureau. Now, for the first time, they were reporting that the Sherwin-Williams delinquent account was in dispute, but they did not give the plaintiff's statement of his reasons for the dispute. Instead, they were reporting that there was "LITIGATION PENDING" on the Sherwin-WIliams delinquent account, inferring that plaintiff was being sued on this account. Plaintiff was not being sued on the Sherwin-Williams account and said account had prescribed in May of 1983.

A jury of seven men and women chosen by the defendant credit bureau heard the case for three days. They deliberated for five hours and returned a verdict finding that the defendant credit bureau willfully violated every one of the requirements of the Fair Credit Reporting Act. They further found that the plaintiff suffered actual damages as a result of there willful violations in the amount of $100,000.00 for embarrassment, humiliation, loss of his good name, and loss of his creditworthiness. They further assessed the defendant credit bureau with punitive damages in the amount of $100,000.00. The trial judge added the amount of $867.20 for court costs and awarded plaintiff the amount of $28,840.00 for attorney fees as a result of his successful action to enforce liability under the Fair Credit Reporting Act, Section 1681n. The

trial courtdenied motions for judgment notwithstanding the verdict, for a new trial, and for a remittitur. The trial judge found that the wilful violations were more than amply proven, that the actual damages suffered by the plaintiff as a result of these violations were more than amply proven, that the actions of the defendant credit bureau in trampling recklessly on the rights of the plaintiff were contumacious, pertinacious, and intractable, and that the failure of the defendant credit bureau to clarify the notation on the Sherwim-Williams account, "LITIGATION PENDING", to show that plaintiff was not being sued on the Sherwin-Williams account, but rather that plaintiff was suing the defendant credit bureau for willfully violating the Fair Credit Reproting Act, was inexcusable and inexplicable. The trial judge said that if the case had been tried before him without a jury, he would have found continuing willful failures on the part of the defendant credit bureau to comply with the requirements of the act, and that said defendant was lucky that it was not tried before him without a jury, referring to the award for the amount of actual damages suffered by the plaintiff, and the amount of the assessment of punitive damages to discourage the defendant credit bureau and all others from like conduct in the future. He expressed a hope that the amount of the punitive damages would have some effect on the defendant credit bureau's future conduct, and said that a smaller amount might not so affect this particular defendant credit bureau.

The defendant credit bureau appealed to the Court of Appeals for the Fifth Circuit contending that there can be no finding of a willful failure to comply with the requirements of the Fair Credit Reporting Act unless the plaintiff first prove malice and evil motive on their part. Section 1681h(e) of the act expressly provides that malice

and willful intent to injure need not be shown in order to show a willful or negligent failure to comply with the requirements of the act. The Court of Appeals for the Fifth Circuit set aside the jury's award of punitive damages for willful violations of the act on the basis that there was no showing of malice and willful intent to injure, that there was no showing that the defendant credit bureau set out ot do the plaintiff harm, that they knowingly and intentionally committed an act in conscious disregard for the rights of the plaintiff. The Court of Appeals found that the defendant credit bureau negligently violated every provision of the Fair Credit Reporting Act and that $25,000.00 was the maximum on plaintiff's permissable recovery for humiliation, embarrassment, loss of his good name, and loss of his creditworthiness. The Court of Appeals gave the plaintiff the choice of accepting the $25,000.00 maximum or accepting a new trial on the issue of damages. They awarded the plaintiff costs in the trial court and in the Court of Appeals and affirmed the award of attorney's fees in the trial court but awarded no attorney's fees for 272.2 hours of work in the Court of Appeals, work that was shown on a contemporaneous time report, work spent successfully enforcing liability on the part of the defendant credit bureau under the act. Plaintiff accepted the remittitur of all but $25,000.00 of his actual damages, but seeks a writ of certiorari, or review, in this Court on the vacating of the award of punitive damages and the refusal to award the plaintiff any attorney's fees for 272.2 hours spent in the Court of Appeals successfully enforcing liability on the defendant credit bureau under the act.

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The court of first instance, the United States District Court for the Eastern District of Louisiana, had jurisdiction in this matter by virtue of the fact that this cause of action was brought under a law of the United States, namely the Fair Credit Reporting Act, 15 U.S.C. 1681-1681t, and was between two parties both of whom were domiciled in the Eastern District of Louisiana. 28 U.S.C. 1331.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Fair Credit Reporting Act, in Section 1681h(e) provides as follows:

> "(e) *Except as provided in sections 1681n (willful non-compliance) and 1681o (negligent non-compliance) of this title,* no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency . . . except as to false information furnished with malice or willful intent to injure such consumer.

Since this suit was brought under the provisions of sections 1681n for willful failure to comply with the requirements of the Fair Credit Reporting Act, it can readily be seen that the "malice and willful intent to injure such consumer" has no application.

The question of whether or not malice or willful intent to injure the consumer must be proved by the plaintiff

before a defendant credit bureau can be found to have willfully violated the provisions of the Fair Credit Reproting Act and be therefore liable to the consumer for punitive damages was raised in the Court of Appeals for the Eighth Circuit in 1980 in the case of Thornton v. Equifax, Inc., C. A. 8th Cir. 1980, 619 F. 2d 700. The Eighth Circuit decided on page 705:

> "(6) The same standard of proof as required in section 1681h(e), however, is not required for allegations of non-compliance with the provisions and requirements of the Act, sections 1681n (willful non-compliance) and 1681o (negligent non-compliance). *Punitive damages awarded under section 1681n are within the discretion of the court and malice or evil motive need not be found for such award,* but the violation must have been willful. . . . ."

When the Court of Appeals for the Fifth Circuit was presented with the same question as to whether a showing of malice or evil motive was a prerequisite to a finding of a willful failure to comply with the requirements of the Fair Credit Reproting Act and an award of punitive damages, they disregarded the express provisions of the act itself and held that there was no willful failure to comply with the act because "*there is simply nothing to even suggest that (the defendant credit bureau) willfully set out to do (the plaintiff) harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of (the plaintiff).*" The Court of Appeals for the Fifth Circuit held in this case that before punitive damages can be awarded for a willful violation of the act that "malice or evil motive need be found." This decision of the Court of Appeals for the Fifth Circuit in this case is in square conflict with the decision of the Court of Appeals

for the Eighth Circuit in the Thornton case, supra, it is a real and embarrassing conflict of opinion and authority between courts of appeals; it is a principle of national importance affecting every consumer who ever had a charge account or who ever hopes to open a charge account. There should be a consistency of decisions on the same federal issues and this Court is the only Court that can bring consistency among the circuits.

The defendant credit bureau failed to note the dispute and the statement of the reasons therefor, they failed to send a revised report to Western Auto as requested, they failed to reinvestigate the account "using reasonable procedures to assure maximum possible accuracy of the information" they were reporting concerning the plaintiff (they made one phone call to the man accused of making the unauthorized charges on the plaintiff's account and simply asked him if plaintiff owed the account), and they failed to remove this item from the plaintiff's credit file after they failed to obtain verification of the account. The Court of Appeals for the Fifth Circuit held that 'Willful' is a word of many meanings. Justice Boehm of the New York Supreme Court had this to say:

> "I will not here review the record which, as stated supports the jury's finding of willful noncompliance. Suffice it to say that the jury found that the *defendant's acts were not accidential, that they were not innocent, that they were not unintentional;* but rather, that *they were deliberate and purposeful,* that they were the routine method of conducting its business and that *they were in complete disregard of the clear requirements of the law. The non-compliance of the defendant was willful in the full legal sense of that word.*" *Nitti v. Credit Bureau of Rochester, Inc., 1975, 375 NYS 2d 817, 84 Misc. 2d 277.*

What was the explanation of the defendant credit bureau for all of these failures to comply: first, they did not consider a letter from an attorney sufficient to constitute a dispute, the consumer must come to them in person; second, they have no "reasonable procedures to reinvestigate disputed items" and cannot ask their subscribers for verification; they cannot delete items from a consumer's credit file unless their subscriber tells them to (Sherwin-Williams told them in no uncertain terms to delete any reference to Sherwin-Williams from the plaintiff's credit file after the jury returned its verdict); and that they are a mere "conduit" for information. Their explanation for "LITIGATION PENDING" was that it meant that the plaintiff was suing Sherwin-Williams and if any subscriber wanted further explanation, he could call them.

Justice Boehm also had this to say about "malice and evil motive":

> "Defendant further argues that punitive damages may not be awarded in the absence of a showing of malice or evil motive.This may be the common law rule, but that rule has no application to the act, where the awarding of punitive damages is not based upon the common law but upon a statutory requirement of willful non-compliance, nothing else." *Nitti case, supra, page 821.*

Punitive damages are meant to punish, to deter, to warn, to prevent, to protect. Plaintiff is but an accidential beneficiary. Again, in the Nitti case, supra, page 821, Justice Boehm cites the case of *Reynolds v. Pegler, 123 F.Supp. 36, D.C.N.Y., aff'd 223 F. 2d 429, 2d Cir., cert den. 350 U.S. 846, 76 S. Ct. 80, 100 L. Ed. 754,* wherein an award of punitive damages of $175,000.00 was sustained where

only $1 of compensatory damages was awarded.

As to an award of attorney's fees for work done in the appellate court, the Court of Appeals for the Sixth Circuit said, "We have no doubt that Congress intended in authorizing attorney's fees in lawsuits under the FCRA, 15 U.S.C. Sections 1681n (willful non-compliance), 1681o (negligent non-compliance), to make use of the private attorney general concept." Comparing suits under the FCRA to civil rights cases, the Court said that the purpose of awarding attorney's fees is to encourage lawyers to accept such cases, and to "*guarantee that a lawyer will be awarded fees for all of his hours reasonably spent in presenting the issues on which his side prevailed, and in vindicating the rights Congress had in mind.*" *Bryant case, supra, pages 79, 80.*

WHEREFORE, applicant prays that this Court grant the writ of certiorari, or review herein, and after due proceedings had, bring back consistency among the circuits on the questions presented for review, reinstate the punitive damage award made by the jury and the trial judge in keeping with the clear provisions of the Fair Credit Reporting Act, and enforce the guarantee that a lawyer will be compensated for all of his hours spent in enforcing liability under the act, both in the trial court and in the appellate courts.

Respectfully submitted,

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APPENDIX A

Thomas K. PINNER, Plaintiff-Appellee Cross-Appellant,

v.

James J. SCHMIDT, the Sherwin-Williams Company and Credit Bureau Services-New Orleans, d/b/a Chilton Corporation, Etc., et al., Defendants-Appellants Cross-Appellees.

No. 85-3524

United States Court of Appeals,
Fifth Circuit.

Dec. 18, 1986.

Rehearing and Rehearing En Banc Denied Feb. 10, 1987.

Consumer brought action against account holder, store manager, and credit bureau service for damages to his creditworthiness and reputation, humiliation and mental distress, noncompliance with Fair Credit Billing Act, and negligent and willful violations of Fair Credit Reporting Act. The United States District Court for the Eastern District of Louisiana, 617 F.Supp. 342, Charles Schwartz, Jr., J., entered judgment on jury verdict for consumer. On appeal, the Court of Appeals, Edwin F. Hunter, Jr., District Judge, sitting by designation, held that: (1) jury could find that credit bureau service had negligently violated Fair Credit Reporting Act by contacting only store manager during reinvestigation of disputed debt and by failing to clarify that pending litigation over debt was instituted by consumer; (2) credit bureau service had not

willfully violated that act and could not be held liable for punitive damages, in view of testimony concerning attempts to contact consumer's attorney by telephone; (3) account holder could not have violated Fair Credit Billing Act as consumer had failed to provide timely notice of billing error, and account holder had not defamed consumer by communicating false information to credit bureau service; (4) manager's allegedly defamatory statements and actions were either time barred or were substantially true; and (5) compensatory damage award was excessive, and conditional remittitur would be ordered with maximum recovery limit of $25,000.

Affirmed in part, reversed and rendered in part, and reversed in part.

1. Credit Reporting Agencies 1

Credit reporting agency has duty of reasonable care in preparation of consumer report and duty to reinvestigate and delete information from that report which is found to be inaccurate or no longer verifiable once consumer has protested material's inclusion. Consumer Credit Protection Act §§ 607(b), 611(a), as amended, 15 U.S.C.A. §§ 1681e(b), 1681i(a).

2. Federal Civil Procedure 2331

In assessing motions for new trial or remittitur court is called upon to determine whether verdict is excessive or contrary to weight of evidence or has resulted in miscarriage of justice.

3. Credit Reporting Agencies 4

Jury could find that credit bureau service had negligently breached statutory duty to reinvestigate disputed information in consumer's file, based on evidence that service had contacted only manager of account holder's store after receiving notice of dispute over account from consumer's attorney, as service knew of manager's past disagreements with consumer. Consumer Credit Protection Act § 611(a), as amended, 15 U.S.C.A. § 1681i(a).

4. Credit Reporting Agencies 3

Credit bureau service breached its statutory duty to follow reasonable procedures to assure maximum possible accuracy of information in consumer report, where it noted that litigation was pending over reported debt without indicating that consumer had instigated that litigation; ambiguity as to who was being sued could have been simply prevented, particulary in light of service's knowledge of dispute. Consumer Credit Protection Act § 607(b), as amended. 15 U.S.C.A. § 1681e(b).

5. Credit Reporting Agencies 4

Credit bureau service had not willfully violated Fair Credit Reporting Act and could not be liable for punitive damages based on failure to follow reasonable procedures to assure maximum possible accuracy of consumer report and failure to adequately reinvestigate disputed entry on that report, where service had promptly furnished consumer with copy of credit report on request and had made no effort to conceal any information and service employee's unrefuted testimony established that they had twice

attempted to contact consumer's attorney by telephone to relay that accuracy of disputed information had been reaffirmed. Consumer Credit Protection Act § 616, as amended, 15 U.S.C.A. § 1681n.

6. Credit Reporting Agencies 1

Account holder was not liable for violation of Fair Credit Billing Act based on failure to reinvestigate and verify disputed billing, where consumer had not given written notice of specific dispute until more than 60 days after receipt of statement which allegedly contained billing error. Consumer Credit Protection Act §§ 161-171, as amended, 15 U.S.C.A. §§ 1666-1666j.

7. Libel and Slander 1

Under Louisiana law, party seeking to maintain action in defamation must prove defamatory words, publication, falsity, actual or implied malice, and resulting injury, and truth or substantial truth is defense to suit for defamation. LSA-C.C. art. 2315.

8. Libel and Slander 55

Account holder could not be liable to consumer for defamation based on communication of information regarding deliquent account that overstated debt by less than $50; potential creditor would only be concerned with fact of delinquency, not amount, and information presented was substantially correct. LSA-C.C. art. 2315.

9. Libel and Slander 55, 76

Manager of store owned by account holder could not

be liable for defamation to consumer based on alleged statements that consumer was using illegal drugs and was wanted by FBI and that consumer's life was in danger or on alleged placing of fictitious charges on consumer's account and confirmation that account was delinquent; claim was filed more than one year after statements were allegedly made and was therefore time barred, and information regarding account was substantially correct. LSA-C.C. arts. 2315, 3492.

10. Credit Reporting Agencies 4
Federal Courts 945

Award of $100,000 in compensatory damages arising from credit bureau service's negligent violations of Fair Credit Reporting Act was excessive and conditional remittitur with $25,000 as maximum possible recovery would be ordered, in absence of evidence that consumer suffered any out-of-pocket expenses and in view of realistic levels of consumer's humiliation and embarrassment. Consumer Credit Protection Act §§ 602-622, as amended, 15 U.S.C.A. §§ 1681-1681t.

Harry Rosenberg, Phelps, Dunbar, Marks, Claverie & Sims, Taryn S. Southon, New Orleans, La. for CBS.

Ralph R. Alexis, III, Porteous, Hankel, Johnson & Sarpy, New Orleans, La., for Schmidt and Sherwin-Williams.

Edward K. Pinner, Sr., New Orleans, La., for Pinner.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE and HILL, Circuit Judges, and HUNTER*, District Judge.

EDWIN F. HUNTER, Jr., District Judge:

We review a judgment entered after a jury returned a verdict in the amount of $200,000 for violations of the Fair Credit Reporting Act, 15 U.S.C.A §§ 1681-1681t (West Supp. 1986), damage to creditworthiness and reputation, and humiliation and mental distress. Defendants appeal from the denial of their motions for directed verdict, judgment notwithstanding the verdict, and a new trial or remittitur. Plaintiff appeals from the denial of his motion to amend the judgment to include an award of pre-judgment interest.

1.BACKGROUND

Plaintiff-Appellee, THOMAS K. PINNER, was formerly employed at a store owned by defendant-appellant SHERWIN-WILLIAMS. Defendant-appellant JAMES E. SCHMIDT managed the store. Pinner worked as an outside sales representative, selling Sherwin-Williams products to customers within his sales territory. During his tenure as an employee Pinner maintained a personal charge account with the company on which he could charge merchandise for himself or his family. Pinner would occasionally use this account to charge merchandise for his

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* District Judge of the Western District of Louisiana, sitting by designation.

customers who had no account at the store of their own. Pinner nevertheless remained personally responsible for the account at all times.

As the district judge noted, "considerable tension developed between plaintiff and Schmidt, attributable to, inter alia, social and business rivalry." Plaintiff's brief describes plaintiff as a handsome young male and Schmidt as a middle aged, dominant male who sexually harrassed several young female employees. Plaintiff argues " a relationship began to bloom between Pinner and one of the young female employees, the one defendant Schmidt wanted the most, the one defendant Schmidt had wanted since she was nine years old, the one Schmidt was obsessed with."[1]

The tension between Pinner and Schmidt led to a dispute over Pinner's personal charge account. Pinner

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[1] In their Motion in Limine, defendants anticipated the saturation of ad hominem sex revenge evidence which plaintiff might use to support his case. The trial judge denied the motion to exclude the evidence. It was permitted to show Schmidt's alleged motive—his hatred of Pinner. This evidence became a center piece of the trial as illustrated by this excerpt:

> "Defendant Schmidt fancied himself as a bull moose on a mountain with 30 cows being threatened by a younger bull."

Schmidt categorically denied the harassment charges. Moreover one of two complaining young ladies who testified as to a sexual advance by Schmidt related that her knowledge of sex at that time was limited to "ideas from reading books." This was later specifically refuted by two male witnesses who testified as to their activities with her contemporaneously with the period at issue. Counsel for plaintiff in an eloquent closing argument referred to these two rebuttal witnesses as the "kiss and tell" boys.

There are no empirical data or studies of psychological influence that can be brought to bear, at least with any clear focus on a specific case. But, our analysis of the entire record persuades us that the admission of this evidence may have triggered the damage awards.

believed that Schmidt had entered several fictitious charges on his account while Pinner was on vacation. As the working relationship soured in late 1980 Pinner left Sherwin-Williams with his personal charge account reflecting a $171.11 debit balance, a figure Pinner vigorously disputed. The evidence at trial tended to show that the correct balance was $121.71.

Sherwin-Williams is a subscriber of defendant-appellant C.B.M. of Louisiana, Inc. (Chilton), a credit reporting agency. Chilton receives various types of credit information from its subscribing companies, including the payment history of the companies' consumer debtors. Chilton then distributes its credit reports on consumers to other subscribing companies.

Sherwin-Williams executive Robert Stewart classified Pinner's account as delinquent in June,1980, and again in January, 1981. This information was relayed to Chilton at these times and was included in Pinner's credit file. Sherwin-Williams made no mention of Pinner's objections to the amounts allegedly due. Stewart also reported the account as deliquent to a collection agency. On October 8, 1981, Pinner attempted to purchase tires on credit but was refused after the tire company routinely consulted Chilton for Pinner's credit history. It was at this point that Pinner learned of the delinquent account report. Pinner then requested and received a copy of his credit report from Chilton showing his account as delinquent. He also received materials which explained the procedure to follow if he disputed any part of the report. On January 11, 1982, Pinner's attorney sent a letter to Chilton notifying them that Pinner disputed the accuracy of the Sherwin-Williams charges. The letter clearly set forth the dispute between

Pinner and Schmidt over the charge account and requested an investigation of the accuracy of the balance. Chilton employees contacted Sherwin-Williams and received verification from Schmidt that Pinner's account remained delinquent.

In February, 1982, Pinner was denied charge accounts by D.H.Holmes Company, Ltd., and Danny's Clothing Store. Both stores advised him in writing that the denials of credit were based on information they received from Chilton. Pinner again requested a copy of his credit report. The report he received, issued two months after his attorney's letter notifying Chilton that the account was disputed, still indicated that he had an undisputed delinquent account with Sherwin-Williams. In fact Chilton never amended Pinner's credit file to show the account balance was disputed. After suit was filed, however, Chilton noted in the file "Litigation Pending." The notation did not specify whether Pinner was plaintiff or defendant in the litigation.

Pinner sought recovery against Schmidt and Sherwin-Williams under La.Civ.Code Ann. art. 2315 (West Supp.1986) on several theories including damage to his creditworthiness and reputation and damages for humiliation and mental distress. Pinner also made claims against Sherwin-Williams for non-compliance with the Fair Credit Billing Act, 15 U.S.C.A. §§ 1666-1666j (West Supp.1986), and against Chilton for both negligent and willful violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C.A. §§ 1681n and 1681o (West Supp.1986).

At trial the district court dismissed Pinner's claims based on the credit report he obtained after attempting to

buy tires. The court reasoned that Pinner's request was the first notice Chilton had received of Pinner's dispute with Sherwin-Williams. It also denied Chilton's motion for a directed verdict on the issue of punitive damages.

In response to a special interrogatory form, agreed upon by the parties, the jury returned a verdict finding that: (1) Schmidt was at fault in a way that caused damage to the plaintiff; (2) Sherwin-Williams was at fault in a way that caused damage to the plaintiff; (3) Chilton negligently failed to observe the requirements of the FCRA; (4) Chilton willfully failed to observe the requirements of the FCRA; (5) fair and adequate compensation to be awarded to the plaintiff for his actual damages was $100,000; and (6) punitive damages whould be assessed in favor of plaintiff against Chilton in the amount of $100,000.

Although the claims were under both Louisiana and federal law, neither side requested the jury to apportion the judgment to specify what aspect of the award was attributable to each defendant. The trial judge entered a judgment holding Schmidt, Sherwin-Williams and Chilton liable in solido for the $100,000 compensatory damages.[2] Chilton alone was cast for $100,000 punitive damages. Each defendant filed a motion for judgment notwithstanding the verdict or alternatively for a new trial or a remittitur, 617 F.Supp. 342. The motions were denied. This appeal followed.

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[2] In the absence of a demand by the parties that an issue be submitted to the jury and if such an issue is omitted, Fed.R.Civ.P. 49(a) allows the court to make its own findings on the omitted issue. See *Taherzadeh v. Clements*, 781 F.2d 1093, 1100 (5th Cir.1986).

II. CHILTON'S LIABILITY UNDER THE FCRA

Congress, in enacting the FCRA, sought to require consumer reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit in a manner both fair and equitable to the consumer. 15 U.S.C.A. § 1681(b). The legislative history of the FCRA indicates that its purpose is to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance, or employment.

[1] The facts of this case present two possible bases of liability under the FCRA. First, the FCRA provides that in preparing a consumer report a credit reporting agency must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C.A. § 1681e(b). This section imposes a duty of reasonable care in the preparation of a consumer report. *Thompson v. San Antonio Retail Merchants Association*, 682 F.2d 509, 513 (5th Cir. 1982). Second, the FCRA imposes a duty upon reporting agencies to reinvestigate and to delete information found to be inaccurate or no longer verifiable once the consumer has protested the inclusion of the material. 15 U.S.C.A. § 1681i.[3] A negligent violation of either of these

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[3] §1681i(a) provides:

> If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless

sections subjects the credit reporting agency to liability for any actual damages sustained as a result of the violation, together with the costs of the action and a reasonable attorney's fee. 15 U.S.C.A. § 1681o. A willful violation of either section subjects the agency to punitive damages as well. 15 U.S.C.A. § 1681n.

Our review of Chilton's appeal from denials of motions for directed verdict and judgment notwithstanding the verdict is governed by the standard set forth by this court in *Boeing Co.v. Shipman*, 411 F.2d 365 (5th Cir.1969):

> On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

411 F.2d at 374.

[2] In assessing motions for new trial or remittitur the court is called upon to determine whether the verdict is excessive or contrary to the weight of evidence or has resulted in a miscarriage of justice.*Brazile v. Bisso Marine*

(footnote 3 continued)
it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

Co., 606 F.2d 101, 105 (5th Cir. 1979), *cert. denied*, 449 U.S. 829, 101 S.Ct. 94, 66 L.Ed.2d 33 (1980).

[3] The record reveals evidence from which a jury could find a negligent violation of § 1681i. Once Chilton received notice of the dispute over the Sherwin-Williams account from Pinner's attorney it was obligated to re-verify the accuracy of the delinquent entry. The letter informed Chilton of the Pinner-Schmidt dispute. It was unreasonable for Chilton to contact only Schmidt in its reinvestigation.

The Sixth Circuit has held that where a credit agency knew of a dispute between the consumer and creditors and where the consumer had complained about his consumer report, merely making two telephone calls to the creditors was insufficient to re-verify the information contained in the report. *Bryant v. TRW, Inc.*, 689 F.2d 72, 79 (6th Cir. 1982). Here, Chilton not only called the creditor to re-verify the report but consulted the man they knew to have had disagreements with Pinner in the past. Because of Schmidt's involvement, contacting only him was insufficient to reverify the entry as Chilton was required to do under § 1681i(a). If, as Chilton argues, there was no other authority to turn to to verify Pinner's account, Chilton should have deleted the information altogether, as is required by § 1681i(a).

[4] Turning to liability under § 1681e(b), any person could easily have construed the notation "Litigation Pending" as an indication that the plaintiff was being sued by Sherwin-Williams, while the actual situation was the reverse. It would have been a simple matter to prevent this ambiguity, particularly in light of Chilton's knowledge of Pinner's dispute with Sherwin-Williams. As the court

noted in the well-reasoned opinion of *Alexander v. Moore & Associates, Inc.*, 553 F.Supp. 948, 952 (D.Hawaii 1982), *quoted in Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F.Supp. 972, 977 (M.D.Fla. 1985):

> [§ 1681e(b)] does not require a consumer reporting agency follow reasonable procedures to assure simply that the consumer report be "accurate," but to assure "maximum possible accuracy." Otherwise it would seem that a consumer reporting agency could report that a person was "involved" in a credit card scam, and without regard to this section fail to report that he was in fact one of the victims of the scam. This result cannot have been contemplated under the Act.

608 F.Supp. at 977

In determining liability under the FCRA "[T]he standard of conduct by which the trier of fact must judge the adequacy of agency precedures is what a reasonably prudent person would do under the circumstances." *Thompson*, 682 F.2d at 513. The evidence suffices to show that Chilton's procedures did not meet this requirement.

We have carefully considered each argument presented by Chilton with the premise that our assigned role is neither to re-try the case de novo nor to supplant the jury verdict so long as it is supported by substantial evidence. We find that the district court was eminently correct in denying Chilton's motions for directed verdict, or a new trial in regard to negligent violations of the FCRA.

We can see nothing in this fact situation, however, to justify a finding that Chilton willfully violated the Act.

Punitive damage awards are permitted even without malice or evil motive, but the violation must have been willful under 15 U.S.C.A. § 1681n. *Fischl v. General Motors Acceptance Corporation,* 708 F.2d 143 (5th Cir. 1983). In each case where punitive damages have been allowed the defendant's conduct involved willful misrepresentations or concealments. In *Millstone v. O'Hanlon Reports, Inc.,* 528 F.2d 829 (8th Cir. 1976) punitive damages were found to be proper when the agency sought at every step to block the consumer in his attempts to exercise his rights under the FCRA. There, the agency misled the consumer about the contents of his credit file on three separate occasions. The reports it issued were "rife with innuendo, misstatement, and slander," and the agency did not reveal the contents of the credit file until the commencement of litigation. 528 F.2d at 834. In *Collins v. Retail Credit Co.,* 410 F.Supp. 924 (E.D.Mich. 1976) the agency's report contained statements about the plaintiff regarding her excessive drinking and "alleged instances of low moral character." 410 F.Supp. at 927. The agency also refused to disclose the contents of her file on at least one occasion. *Id.*.

[5] Chilton's conduct in this case in no way resembles the actions of the defendants in *Millstone* and *Collins.* Chilton promptly furnished Pinner with a copy of his credit report when he requested one. No effort was made to conceal anything and the information contained in the credit file was limited to the report on the delinquent Sherwin-Williams account. There was unrefuted testimony from Chilton employees establishing that they attempted to contact Pinner's attorney to relay that Chilton had reaffirmed the accuracy of his credit history. The telephone calls were not returned. Under the plain language and legislative history of § 1681n, punitive damages are

appropriate only where the violation has been willful. "Willful" is a word of many meanings—its construction often influenced by its context. But here there is simply nothing to even suggest that Chilton willfully set out to do Pinner harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of others. The jury's award of punitive damages lacked any evidentiary support whatsoever. The facts and controlling case law mandate that the punitive damage award be vacated. It is.

III. LIABILITY OF SCHMIDT AND SHERWIN-WILLIAMS

Since neither the jury nor the district court specified the legal theory upon which Schmidt and Sherwin-Williams were found liable, we examine the evidence under each of Pinner's claims.

[6] Beginning with Sherwin-Williams, it is clear that it could not have been held liable for a violation of the Fair Credit Billing Act, 15 U.S.C.A. §§ 1666-1666j (West Supp. 1986). That Act provides a procedure through which a debtor can dispute statements containing a billing error issued by a creditor. To trigger the creditor's obligation to reinvestigate and verify the billing, the debtor must give written notice of the specific dispute within sixty days of receipt of the statement. 15 U.S.C.A. § 1666(a). Pinner first notified Sherwin-Williams of his objection to his statement on March 13, 1981; he had received the statement on December 20, 1980. As the sixty day notice period begins to run when a disputed statement is first received, Pinner did not complain about the erroneous statement within the applicable time period and Sherwin-Williams' obligations

under the Act were not triggered. *See Gray v. American Express Co.*, 743 F.2d 10, 14-15 (D.C.Cir. 1984).

[7] Pinner's claim against Sherwin-Williams under La.Civ.Code Art. 2315 (West Supp. 1986)[4] is essentially an action in defamation. To maintain an action in defamation, the following elements must be proved: (1) defamatory words; (2) publication; (3) falsity; (4) malice, actual or implied; and (5) resulting injury. *Cangelosi v. Schwegmann Brothers Giant Super Markets,* 390 So.2d 196, 198 (La.1980). Truth or substantial truth is a defense to a defamation suit. *Baste v. Guiteau,* 413 So.2d 559 (La.App. 1st Cir. 1982); *Rosen v. Capital City Press,* 314 So.2d 511 (La.App. 1st Cir. 1975).

[8] We find no support for Pinner's contention that Sherwin-Williams communicated false information to Chilton. Pinner's argument that the information was erroneous as to the amount of the debt is unconvincing. The record clearly shows that Pinner had a delinquent account with Sherwin-Williams in the amount of $121.71. A potential creditor checking with Chilton would only be concerned with whether or not the account was delinquent, not with whether the balance was $171.11 or $121.71. The evidence reveals that the information presented to the Credit Bureau by Sherwin-Williams and Schmidt that plaintiff owed money was substantially correct.

[9] There appear to be three acts for which Schmidt could be found liable under Article 2315: (1) Schmidt's alleged statements to two ladies that Pinner was using

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[4] Article 2315 provides in pertinent part; "A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it".

illegal drugs, was wanted by the F.B.I., and that his life was in danger, (2) Schmidt's alleged placing of fictitious charges on Pinner's account; and (3) Schmidt's confirmation of Pinner's account as deliquent when Chilton checked with him following receipt of the letter from Pinner's attorney.

Any claim arising out of the first of these acts is barred by the time limitations of La.Civ.Code Ann. art. 3492 (West Supp. 1986), which provides: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained." The statements were made while Pinner was still an employee, which was prior to December, 1980. Any damage was sustained at that time. This lawsuit was not filed until March, 1983, over two years later.[5]

As to the fictitious entries on Pinner's account, the record contains no proof that they were made. The plaintiff introduced no evidence whatsover to indicate that Sherwin-Williams' determination that Pinner owed them $121.71 was not correct. The $49.40 difference between $171.11 and $121.71 represents a credit for merchandise returned by one of Pinner's customers. At trial Sherwin-Williams admitted that Pinner was entitled to this credit. Every penny of the balance was thus accounted for.

Finally, as we have already noted, the information conveyed by Sherwin-Williams to Chilton regarding the

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[5] The remarks allegedly made were not broadcast and the young ladies and plaintiff remained intimate friends. The issue was not pressed upon us. There is no suggestion that these isolated remarks were the basis of any jury finding.

status of Pinner's account was substantially correct. Schmidt simply confirmed the accuracy of that information when contacted by Chilton employees. Any action against him based on this act is thus defeated by the defense of substantial truth. *Batiste,* 413 So.2d 559.

Our review of the record reveals no evidence to support liability against Schmidt or Sherwin-Williams. We reverse the district court's denial of motions for judgment notwithstanding the verdict on the part of Schmidt and Sherwin-Williams.

IV. DAMAGES

All appellants contend that the jury award for compensatory damages was grossly excessive and must be set aside. Even giving due deference to the fact finding role of the jury and the role of the trial court in declining to set aside the award, we must agree. "Surely, there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." *Martell v. Boardwalk Enterprises, Inc.,* 748 F.2d 740, 750 (2nd Cir.1984).

[10] The plaintiff produced no evidence of any monetary damages. He testified that he was embarrassed by his denial of credit and sustained deep emotional distress because of Chilton's negligence. The evidence is far from sufficient to justify an award of $100,000. Despite the excessiveness of the award, however, we believe it is appropriate for us to order a conditional remittitur so as to avoid, if possible, a second trial. *Peters v. T.G. & Y. Stores Company,* 707 F2d 227 (5th Cir.1983). *Howell v. Marmpegaso Compania Naviera,* S.A., 536 F.2d 1032 (5th Cir.

1976). Our power to fix remittiturs is the same as that of the trial court. *Shingleton v. Armor Velvet Corporation*, 621 F.2d 180, 182 (5th Cir.1980). Moreover, as we said in *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 491 n. 4 (5th Cir.1976), "an appellate court that finds a verdict excessive may give plaintiff the choice between a new trial and a remittitur in a specified amount." *Accord, Stapleton v. Kawasaki Heavy Industries, Ltd.* 608 F.2d 571, 574 at n. 7 (5th Cir.1979). In determining the amount of a remittitur, we are guided by the "maximum recovery rule" of this circuit which permits reduction of the verdict only to the maximum amount the jury could properly have awarded. *Keys v. Lauga*, 635 F.2d 330 (5th Cir. 1981). There is no evidence to show that Pinner suffered any out-of-pocket expenses. Pinner testified that he was embarrassed and humiliated about the credit denials from several retail stores. This should support an award of some damages. However, the last time Pinner was denied credit was in February of 1982. This was after Pinner's attorney sent the letter advising Chilton that Pinner disputed his account but before Chilton noted "Litigation Pending" in his credit file. Pinner surely suffered a substantial measure of temporary public humiliation. Plaintiff readily concedes that he subsequently received a $150,000 SBA loan, a boat loan and a car loan and that his gross income from his own business in 1984 was more than a million dollars.

The jury award must be assigned to the more speculative damage elements of future embarrassment or loss of earning capacity or punishment. The amount is simply not "in the ball park" on the evidence in this record. *See Thompson*, 682 F.2d at 513-14; *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir.1976); *Bryant v. TRW, Inc.*, 689 F.2d 72 (6th Cir. 1982).

We do not regard these cases as setting a maximum on a plaintiff's permissible recovery for humiliation and embarrassment, but only as providing guidance as to levels of recovery that are realistic rather than fanciful.. In light of the excessiveness of the compensatory damage award, the judgment against Chilton is reversed and remanded for a new trial on the issue of damages alone, unless plaintiff is willing to remit all compensatory damages in excess of $25,000. Plaintiff's decision is to be made within a time to be fixed by the district court on remand. The award is to bear interest from date of the original judgment entry. The attorney's fee award against Chilton remains. Chilton is to pay costs below and of this appeal.

In summary: As to Chilton, we reverse and render as to the punitive damage award; we affirm the judgment appealed from as to compensatory damages, except as to the amount of those damages. We find $25,000 to be the maximum possible recovery for those damages and order a conditional remittitur. We reverse as to Schmidt and Sherwin-Williams.

AFFIRMED IN PART, REVERSED IN PART AS TO CHILTON with conditional REMITTITUR. REVERSED AS TO SCHMIDT AND WILLIAMS.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED JUNE 28, 1985

THOMAS K. PINNER	CIVIL ACTION
VERSUS	NO. 84-2059
JAMES E. SCHMIDT, III, ET AL	SECTION "A"

JUDGMENT

Considering the verdict rendered by the jury, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of plaintiff Thomas K. Pinner and against defendants James E. Schmidt, III, Sherwin-Williams Co., and C.B.M. of Louisiana, d/b/a Credit Bureau Services - New Orleans, Louisiana, in solido, in the amount of $100,000.00, said amount representing the jury's award of actual damages, together with legal interest from the date of judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of plaintiff Thomas K. Pinner and against defendant C.B.M. of Louisiana, d/b/a Credit Bureau Services - New Orleans, Louisiana in the amount of $100,000.00, said amount representing the jury's award of punitive damages, together with legal interest from the date of judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of plaintiff THomas K. Pinner and against defendant C.B.M. of Louisiana, d/b/a Credit Bureau Services - New Orleans, Louisiana in the amount of $28,267.20, said amount representing attorney's fees and costs to date of judgment as determined by the Court, together with legal interest from the date of judgment.

New Orleans, Louisiana, this **28th** day of June, 1985.

/s/Loretta G. Whyte,

LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY JUNE 28 1985

Thomas K. PINNER

v.

James J. SCHMIDT, et al.

Civ. A. No. 84-2059.

United States District Court,
E.D. Louisiana.

June 28, 1985.

Motion was brought to determine amount of attorney's fees and costs to be awarded against consumer reporting agency for violating Fair Credit Reporting Act. The District Court, Charles Schwartz, Jr., J., held that: (1) agency was liable for $27,400 in attorney fees, and (2) costs of depositions would not be awarded.

Judgment accordingly.

1. Federal Civil Procedure 2742.5

Attorney for successful plaintiff in action under Fair Credit Reporting Act was not obligated to file contemporaneous time records in support of claim for attorney fees in light of claims for time expended prior to adoption of rule requiring such filing and in light of court's making its own determinations as to allowable time. Truth in Lending Act, §§ 616, 617, as amended, 15 U.S.C.A. §§ 1681n, 1681o; U.S. DIst. Ct. Rules E.D.La., General Rule 21.16.

2. Federal Civil Procedure 2737.5

Consumer reporting agency found in negligent and wilful violation of Fair Credit Reporting Act was liable for award of $27,400 in attorney fees computed as follows: 142

hours at $100 per hour, $5,000 for difficulty of case, $700 for skill in trial work, and $7,500 for amount involved and results obtained. Truth in Lending Act, §§ 616, 617, as amended, 15 U.S.C.A. §§ 1681n, 1681o.

3. Federal Civil Procedure 2738

Costs of depositions would not be assessed against consumer reporting agency found in violation of Fair Credit Reporting Act where no depositions were read at trial in lieu of live testimony and no itemization regarding any other use of depositions was provided. Truth in Lending Act, §§ 1681n. 1681o.

ORDER AND REASONS

CHARLES SCHWARTZ, Jr., District Judge.

This matter came before the Court upon motion of plaintiff to determine the quantum of attorney's fees and costs to be awarded as against defendant Chilton [sometimes referred to as the "Credit Bureau"], plaintiff having prevailed on his claims against Chilton under the Fair Credit Reporting Act ["FCRA"], 15 U.S.C. §§ 1681n & 1681o, after trial by jury on May 6-8, 1985.

> Section 1681n of the FCRA provides:
> Any consumer reporting agency ... which willfully fails to comply with [the FCRA] with respect to any consumer is liable to that consumer is an amount equal to the sum of—
> (1) [actual damages];
> (2) [punitive damages]; and
> (3) in the case of any action to enforce any liability under this section, the costs of the action

> together with reasonable attorney's fees as determined by the court.
>
> Section 1681o of the FCRA provides:
>
> Any consumer reporting agency ... which is negligent in failing to comply with [the FCRA] with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> (1) [actual damages];
>
> (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

The jury having found that Chilton failed to observe the requirements of the FCRA both negligently and willfully, this Court may assess attorney's fees against Chilton under either section 1681n or 1681o.

Accordingly, a hearing was held on June 21, 1985 for the purpose of determing the quantum of attorney's fees. Plaintiff requested attorney's fees in the amount of $66,666, computed on a contingent basis of one third the total amount awarded to the plaintiff for both actual and punitive damages as against all defendants, or $200,000. As further support for the requested fee, plaintiff submitted an affidavit showing 259 hours of itemized time expended and unitemized time expended of 400 hours. Plaintiff also requests costs of $1,391.82, supported by an affidavit reflecting same.

Chilton challenges certain of the entries recited on the affidavit regarding attorney's fees and further urges that recoverable fees be limited to time attributable to the successful aspects of plaintiff's FCRA claim against Chilton. Thus, Chilton urges that recoverable fees be limited to $10,500.00. It is further urged that recoverable costs be limited to $867.20.

[1] In making its determinations, the Court relieves counsel of the obligation of filing contemporaneous time records, as required by Local Rule 21.16, added June 30, 1983. There is good cause to excuse plaintiff's counsel from compliance with this rule in light of claims for time expended prior to the adoption of the rule. Moreover, the Court did not accept the face value of the hours claimed by plaintiff's counsel, as will be explained more fully below, and made its own determination as to the allowable time for the services rendered. See Appendix A attached.

[2] Thus, the Court has determined that an award of $27,400 attorney's fees is appropriate in this case and will state with particularity its reasons for this award in accordance with the twelve factors to be considered under *Johnson v. Georgia Highway Express, Inc.*, 448 F.2d 714 (5th Cir. 1974). *See also Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980); *In re First Colonial Corp.*, 544 F.2d 1291 (5th Cir.), *cert denied* 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977). In considering the twelve *Johnson* criteria, the Court is further cognizant of its duty to pay special heed to *Johnson* factors numbers (1) the time and labor involved; (5) the customary fee; (8) the amount involved and the results obtained; and (9) the experience, reputation and ability of counsel. *See Copper Liquor, Inc. v. Adolph Coors Co., supra*, 624 F.2d at 583.

The customery fee for a claim of this sort, computed on a contingent basis in the New Orleans area, would be 33⅓% of the amount recovered. The recovery against the Credit Bureau herein was $133,333.00. Thus, on a contingent basis, a fair and reasonable fee would be the sum of $44,444.33.

The customery fee for an attorney in the New Orleans area having practiced 33 years, as plaintiff's counsel has, would range between $100 to $150 per hour. Moreover, as detailed in Appendix A attached to and made a part of these findings, the Court finds that plaintiff's counsel reasonably expended 142 hours in prosecution of the claim against Chilton. Thus, the Court comptes an attorney's fee of 142 hours at $100 per hour, amounting to $14,200.00.

In considering the novelty and difficulty of the questions presented in this case, the Court finds, that the Credit Bureau made this a difficult, time consuming and arduous case to presecute and made no concessions to plaintiff's attorney's having rarely prosecuted cases in federal court. Regardless of the defendant's actions, however, case was nontheless difficult to prove, and this factor would warrant awarding an additional sum of $5000.

Counsel's preclusion from taking other work and the time limitations imposed by this particular case are set out in counsel's affidavit. These representations are taken into consideration and form a part of the aforesaid additional allowance of $5000.

With regard to the skill requisite to perform the legal services properly, the Court has heretofore noted that counsel has been practicing for 33 years. The Court further notes counsel was a member of the Board of Editors of the Tulane Law Review and was a law clerk for the Louisiana Supreme Court. Counsel's trial demeanor and argument before the jury were outstanding. As demonstrated by their award, the jury obviously agreed with the Court's assessment of this factor. However, counsel was not well

versed in practice before this Court, and this has caused the Court to fix the hourly rate at the lower end of the spectrum for customary hourly rates for one of his years of practice. Thus, by adopting a lower hourly rate of $100 per hour, the Court takes into consideration counsel's relative lack of experience in federal court. However, the Court has liberally construed the time claimed to accomplish each entry on the attorney's affidavit to counterbalance this conservatism. See Appendix A.

Moreover, counsel has computed his trial time as to all defendants at 28 hours, and this Court allowed 14 hours total time as to Chilton. Instead of applying the hourly rate to this time, plaintiff's counsel is entitled to an additional $700 for his skill in trial work over and above the hours claimes to have been expended.

The hourly rates allowed by the Court account for the customary fee and whether the fee was taken on a contingent basis. However, because of his contingent fee arrangement, counsel risked no fee for all his efforts. Thus, in light of the amount involved and the results obtained, an additional award of $7,500 for these factors is appropriate.

The experience reputation, and ability of plaintiff's counsel has already been considered and compensated as set out above with regard to the customary fee and the skill displayed by counsel.

The Court further finds the case was certainly undesirable and unpleasant, particularly as to its involvement in the sexual relations of the various parties and witnesses. But, whereas an additional sum might be awarded for this factor, any such sum is negated by the nature of the professional relationship between plaintiff's counsel

and the plaintiff, namely that of father and son. Therefore, no award is added or subtracted for factors concerning the undesirabilty of the case and the nature and length of the professional relationship with the client.

The total allowance provided by the Court in this case for plaintiff's attorney's fees is justified by a comparison of statutory fees awarded in other cases of federal statutory violations, cited by the parties in their memoranda. *See, e.g., Boca Mara Properies, Inc. v. Int'l Dairy Queen, Inc.* 732 F.2d 1550 (11th Cir. 1984)(plaintiffs recovering $33,000 for claim under Florida Franchise Act; defendant recovering $13,649 on counterclaim; plaintiff's recovering $25,000 attorney's fees); *Bryant v. TRW, Inc.*, 689 F.2d 72 (6th Cir. 1982)(FCRA violation; jury award of $8,000 actual damages; court allowing $13, 705 attorney's fees, in excess of award, so as not to discourage FCRA actions, rejecting defendant's argument that court limited to award of contingency fee); *Copper Liquor, Inc. v. Adolph Coors Co.* 624 F.2d 575 (5th Cir. 1980) (Sherman Act violations; treble damages of $45,000 awarded; court remanding $45,000 attorney's fees award as insufficient—so low as to constitute abuse of discretion); *Kane v. Martin Paint Stores, Inc.* 439 F.Supp. 1054 (S.D.N.Y. 1977), *aff'd* 578 F.2d 1368 (2d Cir. 1978)($22,837 jury verdict for antitrust violations; court awarding $50,670 fees after 10% reduction in hours claimed for failure to keep precise records); *Collins v. Retail Credit Co.* 410 F.Supp. 924 (E.D.Mich. 1976)(FCRA and libel claims; jury awarding $21, 750 actual damages and $300,000 punitive damages; court remitting punitive damages to $50,000 and awarding $21,000 in attorney's fees).

[3] In addition to the foregoing, the Court finds appropriate an award of costs in the amount of $867.20, the figure suggested by defendant. In so doing, the Court declines to award to plaintiff the costs of depositions. No depositions were read at trial in lieu of live testimony, and plaintiff has not provided this Court with an itemization regarding any other use of depositions, such as for impeachment purposes or in connection with any motions.

In sum, the foregoing factors require an award of $27,400 to plaintiff for attorney's fees plus $867.20 for costs. However, the fees and costs awarded herein do not take into consideration nor contemplate time and costs anticipated on any unsuccessful post trial motions filed by defendant and expended in connection with any anticipated appeal.

Accordingly, it is ordered that judgment be entered in accordance with the jury verdict and order and reasons herein.

APPENDIX A

This appendix recites the Court's line by line determinations of recoverable time in this matter, with each

each entry corresponding to the entries set forth in the affidavit of Edward K. Pinner, Sr., dated June 7, 1985, and submitted in support of plaintiff's claim for attorney's fees.

DATE	WORK PERFORMED	TIME/HOURS ALLOWED
March 20, 1981	Interview with client and initial review of documents	0.0
March 20, 1981	Letter to United Compucred disputing account; copy to Sherwin-Williams	0.0
Oct. 19, 1981	Meeting with client regarding his being refused credit by two stores	1.0
Nov. 30, 1981	Meeting with client to review credit report and attached documents	0.50
Jan. 11, 1982	Meeting with client and drafting letter to Credit Bureau; attachments	1.0
Jan. 20, 1982	Returned phone calls to Ms. Camille Gautier at Credit Bureau—Left name and number	0.25
March 5, 1982	Meeting with client regarding his being refused credit by three stores	1.0
April 6, 1982	Meeting with client to review second credit report and attached documents	1.0
May 5, 1982	Investigation of identity of parties defendant	0.0

APPENDIX A—continued

DATE	WORK PERFORMED	TIME/HOURS ALLOWED
July 1, 1982	Meeting with witness	1.0
July 16, 1982	Call to Secretary of State for registered agent of C.B.M. of La. Inc.	0.25
Sept. 21, 1982	Meeting with client concerning the filing of lawsuit	2.0
Oct. 4, 1982	Review of documents and preparation of rough draft of petition	2.0
Oct. 12, 1982	Work on rough draft of petition	0.0
Oct. 15, 1982	Work on rough draft of petition	0.0
Oct. 18, 1982	Work on rough draft of petition	0.0
Nov. 10, 1982	Preparation of final draft of petition and computation of damages	2.0
Nov. 17, 1982	Preparation of final draft of petition and computation of damages	1.0
Jan. 20, 1983	Meeting with client	1.0
Feb. 18, 1983	Meeting with client	1.0
March 15, 1983	Filing of lawsuit-arranging for service on all three defendants	2.0
July 12, 1983	Review of answer and third party demand filed by defts. Schmidt and Sherwin-WIlliams	0.0
July 19, 1983	Review of answer of defendant Credit Bureau	1.0
Aug. 23, 1983	Initial research on Fair Credit Reporting Act and jurisprudence in connection therewith—Supreme Ct. Library	5.0

APPENDIX A—continued

DATE	WORK PERFORMED	TIME/HOURS ALLOWED
Sep. 15, 1983	Research on Fair Credit Reporting Act and jurisprudence in connection therewith	4.0
Oct. 24, 1983	Research on Fair Credit Billing Act at Supreme Court Library	12.0
Nov. 18, 1983	Motion to fix for trial-preparation of and filing	1.0
Dec. 23, 1983	Pretrial conference with Judge Ganucheau-Case fixed for May 16 and May 17, 1984	2.0
Jan. 23, 1984	Review of file and law in connection with preparation of pretrial memorandum	1.0
Feb. 15, 1984	Answer to subpoena duces tecum	1.5
Feb. 21, 1984	Deposition of Thomas K. Pinner	
March 8, 1984	Prepared and noticed request for production of documents to Credit Bureau	3.0
March 27, 1984	Meeting with client to prepare answers to interrogatories from Credit Bureau	3.0
March 29, 1984	Meeting with client to respond to request for production of documents from Credit Bureau	3.0
April 9, 1984	Prepared and noticed written interrogatories to defendants Schmidt and Sherwin-Williams*	1.0

APPENDIX A--continued

DATE	WORK PERFORMED	TIME/HOURS ALLOWED
April 13, 1984	Prepared and filed Amended and Supplemental petition	3.0
April 16, 1984	Request for Production of documents on Credit Bureau and Sherwin-Williams	2.0
April 27, 1984	Study of Petition to Remove	2.0
June 5, 1984	Study of Motion to Dismiss on Prescription	0.0
July 12, 1984	Answer to Motion to Dismiss on Prescription and memorandum in support thereof	0.0
July 25, 1984	Hearing on Motion to Dismiss	0.0
Aug. 1, 1984	Preparation and filing of Amended Petition	3.0
Aug. 7, 1984	Study of 2nd Motion to Dismiss	0.0
Aug. 10, 1984	Answer to Motion to Dismiss and memorandum in support thereof	0.0
Aug. 22, 1984	Hearing on 2nd Motion fo Dismiss	0.0
Oct. 9, 1984	Preparation for and participation in telephone conference with representative of Court.	1.0
Nov. 21, 1984	Study of Motion for Summary Judgment filed by Credit Bureau	3.0
Nov. 27, 1984	Research in connection with response to Motion for Summary Judgment-Supreme Court Library	5.0
Nov. 30, 1984	Opposition to Motion for Summary Judgment, including legal memorandum	5.0

APPENDIX A—continued

DATE	WORK PERFORMED	TIME/HOURS ALLOWED
Jan. 11, 1985	Preparation of affidavit by Thomas K. Pinner in connection with Motion for Summary Judgment	2.0
Jan. 16 1985	Hearing on Motion for Summary Judgment	2.0
Feb. 26, 1985	Deposition of James E. Schmidt, III and Alan Labbe	2.0
Feb. 27, 1985	Study of documents furnished to plaintiff by Sherwin-Williams	2.0
Feb. 28, 1985	Meeting with client and witness to go over documents furnished by Sherwin-Williams	1.5
March 7, 1983	Preparation of and filing of plaintiff's witness list	1.0
March 26, 1985	Study of 200 documents furnished to plaintiff by Sherwin-Williams	2.0
April 5, 1985	Preliminary work on preparation of Pretrial Order	2.0
April 9, 1985	Meeting with co-counsel for defendants to exchange documents and pretrial inserts	1.0
April 10, 1985	Preparation of Pretrial Order	5.0
April 11, 1985	Preparation of Pretrial Order	0.0
April 12, 1985	Completion of Pretrial Order, making and distributing copies thereof	2.5
April 15, 1985	Pretrial Conference	1.0
April 16, 1985	Meeting with witnesses to prepare for depositions	3.5

APPENDIX A—continued

DATE	WORK PERFORMED	TIME/HOURS ALLOWED
April 17, 1985	Confirming depositions of witness	0.5
April 18, 1985	Depositions of Witness	)
APril 19, 1985	Depositions of Witness	7.5)
April 25, 1985	Deposition of Sue Jackson Greer	)
April 25, 1985	Meeting with Attorneys to exchange exhibits	1.0
April 26, 1985	Rough draft of trial memorandum	2.5
April 27, 1985	Final draft of trial memorandum	2.0
April 29, 1985	Preparation of requested jury. instructions	2.5
April 29, 1985	Preparation of three subphoenas	1.0)
April 30, 1985	Preparation of six subphoenas	)
May 3, 1985	Preparation fro trial	2.5
May 6, 1985	Trial of case	)
May 7, 1985	Trial of case	14.0)
May 8, 1985	Trial of case	)
May 15, 1985	Rough draft of motion for attorney's fees and costs	5.0**
May 16, 1985	Rough draft of affidavit regarding work performed in connection with motion for attorney's fees and costs	3.0
May 17, 1985 ment of costs	Final draft of affidavit and state-	3.0
	TOTAL HOURS ALLOWED	142.00

* As with certain other entries for aspects of the case involving Schmidt and Sherwin-Williams, the Court finds issues involving all defendants intertwined and has accordingly allowed partial time where such overlap occurs.

** *See Cruz v. Hauek*, 762 F.2d 1230 (5th Cir. 1985).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED SEPT 5, 1985

THOMAS K. PINNER	CIVIL ACTION
VERSUS	NO. 84-2059
JAMES E. SCHMIDT, III, ET AL	SECTION "A"

AMENDED JUDGMENT

Considering the verdict rendered by the jury, and this Court's Order and Reasons of June 28, 1985 and August 27, 1985,

IT IS ORDERED, that there be judgment in favor of plaintiff Thomas K. Pinner and against defendants James E. Schmidt, III, Sherwin-Williams Co., and C.B.M. of Louisiana, d/b/a Credit Bureau Services - New Orleans, Louisiana, in solido, in the amount of $100,000.00, said amount representing the jury's award of actual damages, together with legal interest from the date of judgment;

IT IS FURTHER ORDERED, that there be judgment in favor of plaintiff Thomas K. Pinner and against defendant C.B.M. of Louisiana, d/b/a Credit Bureau Services - New Orleans, Louisiana in the amount of $100,000.00, said amount representing the jury's award of punitive damages, together with legal interest from the date of judgment;

IT IS FURTHER ORDERED, that there be judgment in favor of plaintiff Thomas K. Pinner and against defendant C.B.M. of Louisiana, d/b/a Credit Bureau Services - New Orleans, Louisiana in the amount of $29,707.20, representing attorney's fees and costs to date of this amended judgment as determined by the Court, together with legal interest from the date of judgment.

IT IS FURTHER ORDERED that there be judgment in favor of Sherwin-Williams Co. and against C.B.M. of Louisiana, d/b/a Credit Bureau, dismissing the cross claim of C.B.M. of Louisiana against Sherwin-Williams Co. with prejudice.

New Orleans, Louisiana, this 4th day of September, 1985.

/s/ Loretta G. Whyte,

LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY SEPTEMBER 5 1985

Thomas K. PINNER

v.

James J. SCHMIDT, the Sherwin-Williams Company, and C.B.M. of Louisiana, Inc. d/b/a Credit Bureau Services—New Orleans.

Civ. A. No. 84-2059

United States District Court,
E.D. Louisiana.

Sept. 3, 1985.

Consumer brought action against account holder and manager of store owned by account holder for damage to his creditworthiness and reputation and for humiliation and mental distress, against account holder for noncompliance with Fair Credit Billing Act, and against credit bureau service for negligent and willful violations of Federal Fair Credit Reporting Act. Following a jury verdict in favor of the consumer, defendants moved for judgment notwithstanding the verdict, new trial or remittitur. The District Court, Charles Schwartz Jr., J., held that: (1) evidence supported the finding that credit bureau service was liable under the Fair Credit Reporting Act for willful noncompliance and negligent noncompliance with the Act, and (2) ample evidence supported innumerable types of intentional and negligent fault on part of holder of consumer's account and manager of store owned by holder.

Order Accordingly.

1. Federal Civil Procedure 2610

In assessing motions for judgment notwithstanding the verdict, district court is called upon to determine whether there is complete absence of proof on issues material to plaintiff's causes of action or whether there are controverted issues of fact upon which reasonable minds could differ.

2. Federal Civil Procedure 2609

In assessing motions for judgment notwithstanding the verdict, district court must review evidence in light most favorable to party against who motions are made.

3. Federal Civil Procedure 2331, 2339

In assessing motions for new trial or remittitur, district court is called upon to determine whether verdict is excessive or contrary to weight of evidence or has resulted in miscarriage of justice.

4. Federal Civil Procedure 2313

Motions for new trial or remittitur are directed to district court's discretion.

5. Libel and Slander 44-(4)

Qualified immunity granted by Fair Credit Reporting Act [Consumer Credit Protection Act. §§ 616, 617, as amended, 15 U.S.C.A. §§ 1681n, 1681o] as to defamation and other types of tort actions was not triggered where no claims were furthered against credit bureau service under LSA-C.C. art. 2315 for intentional tort.

6. Credit Reporting Agencies 4

Evidence that credit bureau service failed to clarify status of consumer's account to specify that consumer was suing holder of account, which normal person could easily have construed as indication that consumer was being sued by holder of account, supported finding of liability of credit bureau service under Fair Credit Reporting Act [Consumer Credit Protection Act, §§ 616, 617, as amended, 15 U.S.C.A. §§ 1681n, 1681o] for willful noncompliance and negligent noncompliance with Act.

7. Credit Reporting Agencies 3

Credit bureau service's duty to exercise reasonable care in preparation of credit reports, arising under 15 U.S.C.A. § 1681e(b), extends to updating procedures, because preparation of consumer report should be viewed as continuous process with obligation to insure accuracy with every additional item of information. Consumer Credit Protection Act. § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

8. Credit Reporting Agencies 4

In light of credit bureau service's actual knowledge of consumer's dispute with holder of consumer's account regarding certain charges, there was ample evidence that credit bureau service did not satisfy its obligations, under 15 U.S.C.A. § 1681e(b), to exercise reasonable care in preparation of credit reports including updating. Consumer Credit Protection Act, § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

9. Credit Reporting Agencies 4

There was ample basis for jury to have concluded that credit bureau service did not act reasonably in connection with its reinvestigation of consumer's credit history, where consumer disputed certain charges to his account, particularly where matters at issue could easily have been remedied by amending consumer's credit history. Consumer Credit Protection Act, § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

10. Credit Reporting Agencies 3

Requirement of direct communication to consumer reporting agency of consumer's dispute with information contained in his file is intended merely to distinguish reporting dispute to store or business whose account is in question from reporting it to credit reporting agency. Consumer Credit Protection Act, § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

11. Credit Reporting Agencies 4

Evidence that credit bureau service failed to clarify status of consumer's account, which consumer disputed, to specify that consumer was suing holder of account, rather than reverse, that account holder's errors gave rise to dispute, and that consumer was thereby damaged, supported jury verdict awarding the consumer actual damages of $100,000 and punitive damages against the credit bureau service of $100,000.

12. Credit Reporting Agencies 4

Ample evidence supported innumerable types of intentional and negligent fault on part of holder of consumer's account and manager of store owned by holder, where there were various accounting errors in respect to consumer's accounts, and account holder admitted such errors at trial. LSA-CC. art. 2315.

13. Credit Reporting Agencies 4

Fact that consumer's complaint charged holder of his account and manager of store owned by account holder with "tortious conduct" and did not specifically urge "negligence" action did not mean that jury should not have been allowed to decide question of defendants' negligence.

14. Credit Reporting Agencies 4

It was appropriate for jury to resolve remaining issues of causation and damages as to any negligent acts of holder of consumer's account and manager of store owned by holder, where they had not stipulated to liability arising from various errors in regard to consumer's account.

15. Interest 65

Consumer could not be awarded pre-judgment interest under Louisiana law where consumer presented claims under both Louisiana and federal law, but did not request jury to apportion judgment to specify what aspect of award was attributable to state law claims.

16. Federal Civil Procedure 2737.5

Consumer was entitled to additional award of attorney fees for time expended to oppose motion of credit bureau service for judgment notwithstanding the verdict, new trial, or remittitur after jury verdict in favor of consumer in his action against credit bureau service for negligence and willful violations of Federal Fair Credit Reporting Act. Consumer Credit Protection Act §§ 616, 617, as amended, 15 U.S.C.A. §§ 1681n, 1681o.

Edward K. Pinner, Sr., New Orleans, La., for plaintiff.

Ralph Alexis, III, Wm. Porteous, New Orleans, La., for Schmidt and Sherwin-Williams.

Harry A. Rosenberg, Taryn A. Southon, New Orleans, La., for Chilton Corp.

ORDER AND REASONS IN CONNECTION WITH POST TRIAL MOTIONS AND JURY CHARGES

CHARLES SCHWARTZ, Jr., District Judge.

This matter is before the Court upon alternative motions of defendants for judgment notwithstanding verdict, new trial or remittitur. For the following reasons, the motions are denied. Plaintiff's motion to amend the judgment to award pre-judgment interest is also denied. However, the Court awards the plaintiff attorney's fees incurred in defense of Chilton's motion, and the previously entered judgment shall be amended accordingly. The judgment

shall also be amended to correct the inadvertent omission of the jury's verdict on the indemnity claim between defendants Chilton Corporation and Sherwin-Williams. Each motion shall be addressed in turn, and where pertinent, the Court will also provide reasons in support of certain of its charges to the jury.

At all relevant times, plaintiff was a salesman assigned to work at a Gentilly paint store owned by defendant Sherwin-Williams and managed by defendant James E. Schmidt. The evidence showed that considerable tension developed between the plaintiff and Schmidt, attributable to, inter alia, social and business rivalry. This tension culminated in a dispute regarding plaintiff's Sherwin-Williams store charge accounts; simply stated, plaintiff challenged the accuracy of certain charges reflected on his accounts. There was such ill-will existing between Schmidt and plaintiff as to cause plaintiff to suspect that certain charges were fictitious and that Schmidt caused those charges to be made. Ultimately, relations between plaintiff and Schmidt deteriorated to the point of Schmidt's circulating malicious gossip about the plaintiff and engaging in other equally immature behavior.

Whatever precipitated the dispute pertaining to the plaintiff's accounts, the evidence showed at a minimum various accounting errors in respect of the accounts, and Sherwin admitted to such errors at trial. However, Sherwin refused to document the accounts when they were challenged by the plaintiff and reported the accounts as delinquent to both a collection agency and to defendant Chilton d/b/a Credit Bureau Services, notwithstanding plaintiff's objections to the amounts due and owing.

The presence of adverse information in plaintiff's credit history did not come to plaintiff's attention until November 1981, when plaintiff requested and received copy of his credit history from Chilton, showing one of his Sherwin accounts as delinquent and placed for collection. Chilton was thereupon notified in writing by plaintiff's attorney on January 11, 1982 that plaintiff disputed the accuracy of the Sherwin charges. This notice clearly and briefly set forth the dispute between the parties and requested amendment of the credit report. As this was Chilton's first notice of the dispute between plaintiff and the Sherwin defendants, the Court directed a verdict in favor of Chilton and against plaintiff as to Chilton's liability for actions taken by it prior to November 1981.

However, Chilton thereafter consistently refused to clarify its reporting of the status of the dispute between the parties to reflect clearly that plaintiff challenged the Sherwin charges, a matter which could have easily been rectified by Chilton. See plaintiff exhibit 29 (Report of 3/30/82; Sherwin account "Placed for collection"); plaintiff exhibit 31 (Report of 3/31/84; Sherwin account showing "Dispute 5/83—Litigation pending"). In fact, neither the actual knowledge of the dispute afforded by plaintiff's counsel's letter, nor that afforded by Chilton's being joined as a party to this litigation was sufficient to move Chilton to adequately amend the matters set forth in plaintiff's credit report, and the evidence showed Chilton's reporting of plaintiff's credit history to have directly caused a denial of credit to the plaintiff.

As a result of this course of events, plaintiff sought recovery herein against Schmidt and Sherwin under article 2315 of the Louisiana Civil Code for damage to his

creditworthiness and reputation and for humiliation and mental distress. Plaintiff also made claims against Sherwin for its noncompliance with the federal Fair Credit Billing Act, 15 U.S.C. § 1666, and against Chilton for both negligent and willful violations of the federal Fair Credit Reporting Act [hereinafter "FCRA"], 15 U.S.C. §§ 1681n & 1681o. For alleged willful violations of the FCRA, plaintiff alleged punitive damages were owing.*

The matter came on for trial May 6-8, 1985, and in response to a special interrogatory form, agreed upon by the parites, the jury returned a verdict finding that (1) Schmidt was at fault in a way that caused damage to the plaintiff; (2) Sherwin was at fault in a way that caused damage to the plaintiff; (3) Credit Bureau Services (Chilton) negligently failed to observe the requirements of the FCRA; (4) Chilton willfully failed to observe the procedures of the FCRA; (5) fair and adequate compensation to be awarded to the plaintiff for his actual damages should be assessed in favor of plaintiff against the Credit Bureau in the amount of $100,000; and (7) Sherwin did not owe indemnity to Chilton for the amounts recovered by the plaintiff in this case, under the contract existing between Sherwin-Williams and Chilton.

[1,2] In assessing the motions for judgment notwithstanding verdict, the Court is called upon to determine whether there is a complete absence of proof on issues material to plaintiff's causes of action or whether there are controverted issues of fact upon which reasonable minds could differ. The Court must view the evidence in the light

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* The case was originally filed in Civil District Court for the Parish of Orleans on March 15, 1983 and was removed to federal court upon defendants' joint petition, in light of the federal claims.

most favorable to the party against whom the motions are made. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1982); *Comeaux v. T.L. James & Co.*, 666 F.2d 294, 298 (5th Cir. 1982), *supplemented*, 702 F.2d 1023 (5th Cir. 1983) (per curiam).

[3,4] In assessing the motions for new trial or remittitur, the Court is called upon to determine whether the verdict is excessive or contrary to the weight of evidence or has resulted in a miscarriage of justice. *See Brazile v. Bisso Marine Co.*, 606 F.2d 101, 105 (5th Cir. 1979), *reh, denied* 613 F.2d 314 (5th Cir.), *cert. denied*, 449 U.S. 929, 101 S.Ct. 94, 66 L.Ed.2d 33 (1980). These motions are directed to the Courts discretion. *Id.*

After evaluating the evidence under the above standards, the Court is satisfied that defendants' motions must be denied.

The Court first stresses that if the matter had been tried without a jury, the Court would have found a willful and continuing violation of the FCRA based solely upon Chilton's continuing failure to clarify the status of plaintiff's Sherwin-Williams account to specify that the plaintiff was suing Sherwin-Williams. Any normal person could easily have construed Chilton's reporting as an indication that the plaintiff was being sued by Sherwin-Williams, while the actual situation was the reverse. It would have been a simple matter to prevent this ambiguity, particularly in light of Chilton's actual knowledge of the plaintiff's dispute against Sherwin-Williams. *See Bryant v. TRW, Inc.*, 689 F.2d 72, 78-79 (6th Cir. 1982) (citing Fifth Circuit standards); *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47,

51-52 (D.C. Cir. 1984) (cited by Chilton).

[5,6] In determining the standards applicable to claims made under the FCRA so as to charge the jury and evaluate the propriety of the jury verdict, the Court considered the specific claims here asserted under the FCRA against Chilton. Plaintiff's claims were made expressly under sections 1681n and 1681o of the FCRA. No claims were furthered against Chilton under article 2315 of the Louisiana Civil Code for intentional tort. Accordingly, the qualified immunity granted by the Act as to defamation and other types of tort actions was not triggered in this case, and the evidence presented was more than sufficient to support findings of liability under sections 1681n and 1681o.

[7,8] The Court also observes that Chilton's duty to exercise reasonable care in the preparation of credit reports, arising under section 1681e(b) of the FCRA, extends to updating procedures, because the preparation of a consumer report should be viewed as a continuing process with the obligation to insure accuracy with every additional item of information. *See Thompson v. San Antonio Retail Merchants Ass'n*, 982 F.2d 509 (5th Cir. 1982). There was ample evidence to show that Chilton did not satisfy its obligations in this regard, in light of its actual knowledge of plaintiff's dispute with Sherwin-Williams.

Another of Chilton's contentions, raised in the contexts of the motions for directed verdict and proposed jury charges, although not discussed in Chilton's post trial motions, was that plaintiff should be required to prove that Chilton acted with malice before punitive damages could be assessed. The Court rejected this contention, after

analyzing the claims asserted against Chilton in light of the rules set forth in *Fischl v. GMAC*, 708 F.2d 143 (5th Cir. 1983), wherein the Court stated that as to violations of the FCRA giving rise to punitive damages under section 1681n of the Act, "Malice or evil motive need not be established for a punitive damages award, but the violation must have been willful." *Id.* at 151 (citing *Thornton v. Equifax, Inc.*, 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980)).

The Court also rejected Chilton's contention that reinvestigation under section 1681i is not subject to a reasonableness standard, so long as the technical requirements of that section are met. In support of this argument, Chilton cited *Stewart v. Credit Bureau, Inc., supra*, 734 F.2d 47 (Court rejecting plaintiff's claim under 1681i on motion for summary judgment where he failed to return form submitted to him by credit bureau). This Court finds *Stewart* distinguishable on several grounds and thus does not consider itself bound by Chilton's reading of the case, *See id.* at 55, n. 13.

Among the distinguishing factors are that Stewart did not send **any** statement objecting to the report in question, which was an amended report reflecting the results of a reinvestigation. *Id.* at 50. Second, the jury here could have easily found Chilton's conduct did not adhere to the technical requirements of section 1681i in light of Chilton's apparent disregard of the letter from plaintiff's attorney, reflected by the credit report of March 1982

[9] Lastly, this Court finds Chilton's reliance upon *Stewart* misplaced inasmuch as the *Stewart* court did not in fact resolve the issue whether a reinvestigation must be reasonable once a duty to reinvestigate arises, because it

found that a reasonable reinvestigation occurred under the facts of that case. *See id.* at 55 n. 13. Accordingly, this Court does not read *Stewart* as holding that reinvestigation need not be reasonable and deems it appropriate to observe that there was ample basis for the jury to have concluded that Chilton did not act reasonably in connection with its reinvestigation of plaintiff's credit history, particularly where, as stated above, the matters at issue could have easily been remedied by amending plaintiff's credit history. *See also Koropoulos v. Credit Bureau, Inc.* 734 F.2d 37, 40 (D.C.Cir.1984) (Court balancing ambiguity in report against availability of clarifying information).

Chilton had also objected to the Court's charging the jury as to Chilton's duty to reinvestigate, asserting that section 1681i(a) of the FCRA triggers a duty to reinvestigate only when a dispute is directly conveyed to the consumer reporting agency by the consumer himself, in person. Thus, Chilton contends, the letter here submitted to Chilton by plaintiff's counsel falls short of a "direct" communication by the consumer and absolves Chilton of the duty to reinvestigate. The Court found these contentions wholly unacceptable and takes this opportunity to detail its reasons for rejection of Chilton's position.

The Court did not find any authority expressly discussing an attorney's authority to act for a client in this respect. However, in two cases which this Court finds persuasive, the failure of a consumer to act in person did not prevent consideration of his claims. *See Koropoulos v. Credit Bureau, Inc., supra,* 734 F.2d at 38 (Plaintiff's attorney obtained disclosure of plaintiff's credit file); *Dynes v. TRW Credit Data,* 652 F.2d 35 (9th Cir.1981) (Court interpreting duty to reinvestigate as a matter of first

impression; court holding defendant failed to fulfill duty to reinvestigate after consumer telephoned objection to amended report).

[10] Based upon these cases, common sense and an interpretation of the FCRA as a whole, this Court determines that the requirement of a direct communication is intended merely to distinguish reporting the dispute to the store or business whose account is in question from reporting it to the credit reporting agency governed by the FCRA provisions. It is inconceivable to the Court that an attorney could not represent a consumer in this regard, and the Court opines that requirements of direct communication elsewhere in the FCRA are intended only to protect the consumer by affording him a qualified confidentiality in the extensive information available from his credit files. *See* 15 U.S.C. §§ 1681b, 1681d.

[11] In finding that the evidence more than amply supports the quantum of damages awarded by the jury, the Court is guided by interpretations from the Fifth Circuit of the FCRA, stating, "Even where no pecuniary or out-of-pocket loss has been shown, the FCRA permits recovery for humiliation and mental distress, [citations omitted], as well as for injury to one's reputation and creditworthiness." *Fischl v. GMAC, supra,* 708 F.2d at 151; *Thompson v. San Antonio Retail Merchants Assoc.* 682 F.2d 509, 513 (5th Cir.1982).

The parties did not request the Court to submit to the jury any interrogatories apportioning liability between the Sherwin defendants, who presented a joint defense, and Chilton. It is difficult for this Court to speculate which party's conduct the jury would have found more objectionable

and distressful to the plaintiff. In any event, the amounts awarded as both actual and punitive damages are far from shocking to the Court's conscience, particularly in light of the personal nature and implications of Schmidt's conduct and the principled and unyielding attitude taken by Chilton.

In connection with the quantum of punitive damages, the Court observes that punitive damages are intended to punish. Hopefully, the damages here assessed against Chilton will have some effect on Chilton's future conduct. A smaller amount might not so affect Chilton.

[12,13] The post trial motions of Sherwin and Schmidt are likewise denied. The plaintiff's claims against those defendants were made under article 2315 of the Civil Code. There was ample evidence to support innumerable types of intentional and negligent fault on the part of Sherwin and Schmidt. The Court is here constrained to add that it found totally baseless defendants' objections that the jury should not have been allowed to decide the question of defendants' negligence because the complaint charged defendants with "tortious conduct" and did not specifically urge a "negligence" action. The plaintiff's extensive pleadings and pre-trial memoranda exhaustively detailed the facts and issues to be decided at trial; and in the event of any deficiency, the pleadings would be deemed conformed to the evidence.

[14] Nor did Sherwin-Williams admissions of certain accounting errors in respect of plaintiff's accounts take any issues away from the jury. Defendants had not stipulated to liability and it was certainly appropriate for the jury to resolve the remaining issues of causation and damages as

to any negligent acts. Moreover, allegations of negligence were certainly within the scope of plaintiff's express reliance upon article 2315 for relief and were certainly included within the more serious allegations that defendants inflicted intentional and malicious injury.

[15] Plaintiff's motion for amendment of judgment to award pre-judment interest under Louisiana law is denied. Plaintiff presents claims under both Louisiana and Federal law, but plaintiff did not request the jury to apportion the judgment to specify what aspect of the award was attributable to the state law claims. Thus the Court is unable to determine the amount of the award upon which pre-judgment interest should run and is therefore prevented from entering such an award.

[16] However, plaintiff is entitled to an additional award of attorney's fees for the time expended to oppose Chilton's motion, and the Court hereby finds that plaintiff's counsel expended the time indicated in Appendix "B" attached hereto, for which compensation shall be allowed at the hourly rate of $100, for an additional award of $1440.00. See this Court's prior Order and Reasons of June 28, 1985 and Appendix "A" in respect of attorney's fees, which is incorporated herein as if set out in full. The Court also inadvertently omitted from the judgment the jury's verdict on the indemnity claim, and the judgment shall be amended accordingly. The Clerk of Court is hereby directed to amend the judgment to reflect the additional award and the denial of the indemnity claim.

APPENDIX B

This appendix recites the Court's line by line deter-

minations of recoverable time incurred by plaintiff in connection with his opposition to post trial motions filed by defendants, with each entry corresponding to the entries set forth in the affidavit of Edward K. Pinner, Sr., dated August 6, 1985, and submitted in support of plaintiff's supplemental claim for attorney's fees.

DATE	WORK PERFORMED	TIME/HOURS ALLOWED
July 8, 1985	Reading and studying Motion for Judgment Notwithstanding the Verdict, for a New Trial, and for a Remittitur filed on behalf of Chilton Corporation, and supporting memorandum	2.0
July 11, 1985	Study of legal memorandum of Chilton Corporation	1.5
July 11, 1985	Phone call from counsel for the Chilton Corporation	0.2
July 11, 1985	Phone call from Court personnel regarding Chilton Corporation	0.1
July 11, 1985	Phone call from counsel for the Chilton Corporation	0.1
July 15, 1985	Study of Motion to Stay and Memorandum filed in connection therewith by Chilton Corporation	0.4

July 16, 1985	Reading letter and motion to substitute bond sent by Chilton Corporation	0.1
July 19, 1985	Work on rough draft of memorandum in opposition to motions of Chilton Corporation	2.0
July 26, 1985	Study of motion for post verdict relief by Chilton Corporation and work on rough draft of memorandum	1.5
July 27, 1985	Study of Record in connection with motions by Chilton Corporation for post verdict relief	0.75
July 29, 1985	Reading cases cited by Chilton Corporation in their memorandum	1.0
July 31, 1985	Reading cases cited by Chilton Corporation in their memorandum	1.5
August 5, 1985	Composition of memorandum in opposition to Motions by Chilton Corporation for post verdict relief	1.75
August 6, 1985	Completion of composition of memorandum and preparation of this affidavit	1.5
	Total	14.40

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

Filed FEB 19 1987

GILBERT F. GANUCHEAU
CLERK

February 18, 1987

Mrs. Loretta G. White
Clerk
United States District Court
New Orleans, LA 70130

No. 85-3524 - PINNER v. SCHMIDT, ET AL
(D.C. No. CA-84-2059-"A")

☑ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued aas and for the mandate.

☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☑ Copy of the Court's opinion.

☑ Original record on appeal or review. 8Volumes.

☑ Other original papers forwarded with record,_____Envelope 1 Box.

☐ Bill of Costs approved by this Court. ☐ Copy enclosed to counsel.

cc: (Letters Only)

Hon. Charles Schwartz, Jr.
Mr. Ralph R. Alexis, III
Mr. Edward K. Pinner, Sr.

Sincerely,

Gilbert F. Ganucheau, Clerk

By: /s/ H.W. Adams, Jr.
Deputy Clerk

MDT-1
Rev. 10/86

Filed MAR 5 1987

MINUTE ENTRY
MARCH 4, 1987
SCHWARTZ, J.

THOMAS K. PINNER — CIVIL ACTION

VS. — NO. 84-2059

JAMES J. SCHMIDT, ET AL. — SECTION "A"

The Court having received the mandate of the Fifth Circuit in this case, it is ORDERED that plaintiff shall advise the Court on or before Wednesday, March 18, 1987, whether he accepts the conditional remittitur as to Chilton. If plaintiff does not accept the remittitur by the date, a new trial will be scheduled as to defendant Chilton.

- - - - -

DATE OF ENTRY MAR 5 1987

Filed APR 1 1987

MINUTE ENTRY
ACHWARTZ, J.
APRIL 1, 1987

THOMAS K. PINNER	CIVIL ACTION
VS.	NO. 84-2059
JAMES J. SCHMIDT, ET AL	SECTION "A"

This matter is before the Court upon plaintiff's motion to fix interst on the amended judgment to be entered in acccordance with the Fifth Circuit's mandate herein. Plaintiff's motion also indicates plaintiff's desire to accept the conditional remittitur ordered by the Fifth Circuit. By letter dated March 30, 1987 and signed by counsel for both plaintiff and the remaining defendant Chilton Corporation, counsel have set forth their agreement as to all amounts to be awarded in the amended judgment.

It is thus ORDERED that the plaintiff's motion to fix interest be and the same is hereby dismissed as moot, and the Clerk of Court is hereby ORDERED to enter an amended judgment in favor of $62,590.76, consisting of $25,000 awarded for plaintiff's principal demand against Chilton, plus attorney's fees and costs in the amount of $29,707.20, together with interest as stated in counsel's letter of March 30, 1987.

- - - - -

DATE OF ENTRY APR 1 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED APRIL 3, 1987

THOMAS K. PINNER	CIVIL ACTION
VERSUS	NO. 84-2059
JAMES E. SCHMIDT, III, ET AL	SECTION "A"

JUDGMENT

Considering the Court's written order of April 1, 1987, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of plaintiff Thomas K. Pinner and against defendant Chilton Corporation in the total amount of $62,590.76, consisting of $25,000.00 awarded for plaintiff's principal demand against defendant Chilton Corporation, plus attorney's fees and costs in the amount of $29,707.20, together with legal interest for the period June 28, 1985 to June 28, 1986 in the amount of $4,212.45, and legal interest for the period June 28, 1986 through April 2, 1987 in the amount of $3,443.11, with interest to run from date of judgment.

New Orleans, Louisiana, this 3rd day of April, 1987.

/s/ Loretta G Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY APR 3, 1987

United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO. 85-3524

C.C. Docket No. CA-84-2059-A

THOMAS K. PINNER,

Plaintiff-Appellee
Cross-Appellant,

versus

JAMES J. SCHMIDT, THE SHERWIN-WILLIAMS COMPANY and CREDIT BUREAU SERVICES-NEW ORLEANS, d/b/a CHILTON CORP., Etc., ET AL.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

Before GEE and HILL, Circuit Judges, and HUNTER,* District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal ans was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the District Court in this cause is affirmed in part and reviewed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellant Chilton Corporation pay to plaintiff-appellee and the other defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.

December 18, 1986

ISSUED AS MANDATE: FEB 18 1987

*District Judge of the Western District of Louisiana, sitting by designation.

OP-JDT-9a
Rev. 4/85

IN THE UNITED STATES COURT OF APOPEALS
FOR THE FIFTH CIRCUIT

No. 85-3524

FILED
FEB 10, 1987

THOMAS K. PINNER,
Plaintiff-Appellee,
Cross-Appellant,

versus

JAMES J. SCHMIDT, THE SHERWIN—WILLIAMS COMPANY and CREDIT BUREAU SERVICES-NEW ORLEANS, d/b/a/ CHILTON CORPORATION, ETC., ET AL.,

Defendants-Appellants,
Cross-Appellees.

- - - - - - - - - - - -

Appeals from the United States District Court for the Eastern District of Louisiana

- - - - - - - - - - - -

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 18, 5 Cir., 1986,_____F.2d_____)
(FEBRUARY 10, 1987)

Before GEE and HILL, Circuit Judges, and Hunter*. District Judge..

* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having bveen polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also Denied.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR
STAY OF THE MANDATE.
REHG-7

ENTERED FOR THE COURT

United States Circuit Judge FEB 6 1987

DENIALS OF REHEARING EN BANC

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 35)

Group 1 —Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2 —Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3 —Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Harris v. Sentry Title Co., Inc.	85-1805	2/5/87	N.D.Tex., 806 F.2d 1278
Pinner v. Schmidt	85-3524	2/10/87	E.D.La. 805 F.2d 1253
Sentry Title Co., Inc v. Ward	85-1805	2/5/87	N.D.Tex., 806 F.2d 1278
Swayze v. McNeil Laboratories, Inc.	85-4894	2/6/87	S.D.Miss., 807 F.2d 464

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
COUNSELLORS AT LAW

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February 25, 1987

FILED
FEB 25 1987
BY HAND

RECEIVED
FEB 25 1987

Clerk of Court
United States Court of
Appeals for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: Thomas K. Pinner v. James J. Schmidt et al.
Civil Action No. 85-3524

PHELPS, DUNBAR, Dear Mr. Ganucheau:

This letter will serve to confirm my associate's conversation today with Richard Windhorst regarding withdrawal of the Motion to Recall the Mandate and to Stay the Mandate, pending C.B.M. of Louisiana, Inc.'s application to the United States Supreme Court for certiorari. Undersigned counsel for C.B.M. of Louisiana, Inc. will not pursue an application for certiorari and accordingly the Motion to Recall the Mandate and to Stay the Mandate pending application for certiorari is moot and should be withdrawn.

With best regards, we remain,

Sincerely,

PHELPS DUNBAR MARKS
CLAVERIE & SIMS

BY: /s/ Harry A. Rosenberg/MNA
Harry A. Rosenberg

HAR:dep

cc: Edward K. Pinner, Esq.
Ralph R. Alexis, III, Esq.

7772z

APPENDIX B

CONSUMER CREDIT

15 § 1681e. Compliance precedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the funinshing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(Pub.L. 90-321, Title VI, § 607, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1130.)

§ 1681h. Conditions of disclosure to consumers

Times and notice

(a) A consumer reporting agency shall make the disclosures required under section 1681g of this title during normal business hours and onn reasonable notice.

Identification of consumer

(b) The disclosures required under section 1681g of this title shall be made to the consumer—

(1) in person if he appears in person and furnishes proper identification; or

(2) by telephone if he has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

Trained personnel

(c) Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 1681g of this title.

Persons accompanying consumer

(d) The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

Limitation of liability

(e) Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g. 1681h, or 1681m of this title, except as to false information furnished with malice or willful intent to injure such consumer.

(Pub.L. 90-321, Title Vi, § 610, as added Pub.L. 91-508, Title Vi, § 601, Oct. 26, 1970, 84 Stat. 1131.)

§ 1681i. Procedure in case of disputed accuracy

Dispute; reinvestigation

(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the customer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute if frivolous or irrelevant.

Statement of dispute

(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

Notification of consumer dispute in subsequent consumer reports

(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe

that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

Notification of deletion of disputed information

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

(Pub.L. 90-321, Title VI, § 611, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1132.)

§ 1681n. Civil liability for wilful noncompliance

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub.L. 90-321, Title VI, § 616, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

§ 1681o. Civil libility for neglifent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer's liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub.L. 90-321, Title VI, § 617 as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

Supreme Court, U.S.
FILED
JUN 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1814

In The
Supreme Court of the United States
October Term, 1986

THOMAS K. PINNER,

Petitioner,

VERSUS

JAMES J. SCHMIDT, THE SHERWIN-WILLIAMS CO., AND C.B.M. OF LOUISIANA, INC., d/b/a CREDIT BUREAU SERVICES-NEW ORLEANS,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HARRY A. ROSENBERG
PHELPS DUNBAR MARKS CLAVERIE & SIMS
Thirtieth Floor - Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130-3245
Telephone: (504) 566-1311

Attorney for Respondent, Credit Bureau Services - New Orleans, d/b/a Chilton Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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No. 86-1814

In The
Supreme Court of the United States
October Term, 1986

THOMAS K. PINNER,

Petitioner,

VERSUS

JAMES J. SCHMIDT, THE SHERWIN-WILLIAMS CO., AND C.B.M. OF LOUISIANA, INC., d/b/a CREDIT BUREAU SERVICES-NEW ORLEANS,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REASONS WHY PINNER'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The petitioner requested and elected to accept a substantial payment in satisfaction of his claims; consequently, he cannot now complain to this Court that he should receive more money. The case law of this Court and the

unanimity of the circuit courts make it clear that Pinner's application for certiorari should be promptly denied.

I. Pinner's Attempt to Question the Fifth Circuit's Denial of Punitive Damages is Precluded by his Acceptance of Full Payment of the Remittitur.

In his Petition for Certiorari, Pinner requests that this Court decide whether a plaintiff must prove malice and evil motive as a prerequisite to a finding of a willful failure to comply with the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* and for an award of punitive damages. It is difficult to understand how Pinner can urge such an argument in good conscience, without violating this Court's Rule 21.5, when the Fifth Circuit's decision to preclude punitive damages did not turn upon a finding of malice or evil motive. *Pinner v. Schmidt,* 805 F.2d 1258, 1263 (5th Cir. 1986). Pinner's statement that the Fifth Circuit held that "malice or evil motive need be found" to establish punitive damages is refuted by the language in the lower court's opinion.[1]

The Fifth Circuit properly ruled that an award of punitive damages was impermissible because Pinner did not present any evidence, much less prove, that Chilton

---

[1] Aside from petitioner's illusionary reading of the Fifth Circuit's opinion, it is significant that the Fifth Circuit tracked the exact wording of section 1681n of the Fair Credit Reporting Act. The Court thus observed that "punitive damages are appropriate only where the violation is willful" and held there was "simply nothing to even suggest that Chilton willfully set out to do Pinner harm." *Pinner v. Schmidt, supra,* 805 F.2d at 1263. Recognizing that the district court judgment "lacked any evidentiary support whatsoever," the circuit court vacated the erroneous award of punitive damages. *Id.*

willfully failed to comply with the Fair Credit Reporting Act. While the Fifth Circuit concluded that the contents of Pinner's credit report were accurate, it inexplicably and erroneously chose to order a conditional remittitur regarding the compensatory damage award of $100,000.00 instead of vacating the compensatory damage award as the case law requires. The Fifth Circuit thus ordered a new trial on the issue of compensatory damages unless petitioner was willing to remit all compensatory damages in excess of $25,000.00. *See,* Petitioner's Appendix A, at A-21. Pinner then chose to accept the remittitur in lieu of a new trial. *See,* Petitioner's Appendix A, at A-61.

Pretermitting the correctitude of the lower court's preclusion of punitive damages, Pinner cannot now challenge the circuit court's decision. It is well-settled that a plaintiff may not appeal the propriety of a remittitur to which he has agreed. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) (per curiam). A remittitur gives the plaintiff a choice. He can refuse to accept the reduced amount of damages and instead proceed to a new trial, or he can agree to accept a reduced amount. In this case, Pinner opted to accept the remittitur, and in exchange, he relinquished his right to question the Fifth Circuit's decision with respect to punitive damages.

In *Donovan v. Penn Shipping Co., Inc., supra,* this Court squarely addressed this precise issue and held that unconditional acceptance of a remittitur, as Pinner did below, prevents a litigant from attacking the revised judgment that he accepted. In *Donovan,* the petitioner sought appellate review of the district court's decision ordering a conditional remittitur, which the petitioner had accepted. On appeal, the petitioner requested the Second Circuit

Court of Appeals to "discard the settled rule that a plaintiff who accepted a remittitur may not appeal to seek reinstatement of the original verdict." *Donovan, supra,* 429 U.S. at 649. The Second Circuit Court of Appeals refused to discard this settled rule and dismissed the appeal. In a per curiam opinion reviewing the propriety of the Second Circuit's dismissal, this Court stated that "[t]he Court of Appeals properly followed our precedents in holding that a plaintiff cannot 'protest' a remittitur he has accepted in an attempt to open it to challenge on appeal." 429 U.S. at 649. Pinner did not even protest the remittitur; instead, he readily accepted it. However, it makes no difference whether the remittitur is accepted under protest. As expressed by this Court in *Donovan,* the jurisprudence "has firmly established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed." *Id.* In short, this Court refused to disturb "the long standing rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." *Id.* at 650.

This Court's seminal decision in *Donovan, supra,* has been followed by numerous appellate and district courts, affirming the proposition that the acceptance of a conditional remittitur precludes a later challenge on appeal as to the validity of the remittitur order. *See, e.g., Lanier v. Sallas,* 777 F.2d 321 (5th Cir. 1986); *Higgins v. Smith Int'l, Inc.,* 716 F.2d 278 (5th Cir. 1983); *Call Carl, Inc. v. BP Oil Corp.,* 554 F.2d 623 (4th Cir.), *cert. denied,* 434 U.S. 923 (1977); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.,* 669 F.2d 490 (7th Cir. 1982), *cert. denied,* 459 U.S. 943 (1982).

In this case, Pinner accepted, without reservation, the remittitur of $25,000.00 in lieu of a new trial. Pinner now attempts to challenge the propriety of the conditional remittitur, after he requested and received payment of the revised judgment. Pinner cannot double-dip. Under the jurisprudential authority of this Court, as set forth in *Donovan* and its progeny, Pinner's acceptance of the remittitur precludes him from challenging *any* aspect of that order on appeal.[2]

A situation very much like the case *sub judice* was presented in *Lanier v. Sallas, supra.* In *Lanier,* plaintiff questioned the refusal of the trial court to submit the issue of punitive damages to the jury. In the district court, the plaintiff accepted a remittitur reducing her compensatory damage award for medical malpractice to $50,000.00. The defendants appealed the judgment and the plaintiff cross-appealed the district court's refusal to submit her claim for punitive damages to the jury. In its opinion, the Fifth Circuit ruled that under *Donovan* a plaintiff cannot challenge the propriety of a remittitur order to which he has agreed. While a narrow exception to this tenet allows a plaintiff to accept a remittitur but reserve his right to appeal with respect to an entirely separate and distinct

---

[2] Pinner's acceptance of the conditional remittitur, of course, has no effect on Chilton's right to appeal. As stated in *Higgins v. Schmidt International, Inc., supra,* "*Donovan* does not diminish the defendant's right to appeal a judgment after winning a remittitur." 716 F.2d at 282 n.1. *Accord, Westerman v. Sears, Roebuck & Co.,* 577 F.2d 873 (5th Cir. 1978); *Viestenz v. Fleming Companies, Inc.,* 681 F.2d 669, 702 (10th Cir. 1982), *cert. denied,* 459 U.S. 972 (1982); *Caiazzo v. Volkewagenwerk A.G.,* 468 F. Supp. 593, 607 (E.D.N.Y. 1979), *affirmed in part and reversed in part on other grounds,* 647 F.2d 241 (2d Cir. 1981).

cause of action, the Fifth Circuit, as well as other circuits, uniformly have held that a claim for punitive damages is simply not separate and distinct from a claim for compensatory damages. As stated by the Fifth Circuit in *Lanier v. Sallas, supra,* in order to recover punitive damages, the plaintiff would have to prove every element of her cause of action for compensatory damages. 777 F.2d at 325. In pertinent language, the Fifth Circuit succinctly stated, "[w]hether pleaded in a single count or separately, the punitive damage claim is dependent on establishing liability for compensatory damages and, in addition, establishing malice or some other aggravated circumstance." *Lanier v. Sallas,* 777 F.2d at 325-326.

In the instant case, Pinner's claims against Chilton were predicated upon alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* Pinner's cause of action against Chilton was based on a single cause of action, namely, the Fair Credit Reporting Act. While Pinner sought compensatory and punitive damages under the Fair Credit Reporting Act, the fact remains that Pinner's punitive damage claim is not separate and distinct from his compensatory damage claim. To the contrary, in order to recover punitive damages under the Fair Credit Reporting Act, Pinner would have to prove every element of his claim for compensatory damage under the FCRA for negligence and also prove willfulness. Consequently, Pinner's quick and unqualified acceptance of the remittitur of $25,000.00 in compensatory damages bars Pinner from attacking the Fifth Circuit's ruling via certiorari review on his punitive damage claim.

In sum, Chilton respectfully submits that, as in *Lanier v. Sallas, supra,* Pinner's claim for punitive damages under

the Fair Credit Reporting Act is "inextricably intertwined with the claim for compensatory damages, and, consequently . . . [Pinner's] acceptance of a remittitur bars [his] appeal of the [Fifth Circuit's] action on the punitive damage claim." *Id.* at 322. By electing to accept the remittitur of $25,000.00 as a compensatory damage award in lieu of a new trial, Pinner waived his right to appeal the Fifth Circuit's action on his punitive damage claim and, therefore, Pinner's request for certiorari review of the Fifth Circuit's action on his punitive damage claim should and must be denied.

II. A Writ of Certiorari Should Not Issue to Increase Pinner's Attorney's Fees.

In his Petition, Pinner seeks review of whether the award of $27,400.00 in attorney's fees (to compensate him for obtaining a $25,000 verdict on behalf of his client/son) should be increased. But this question is not properly before the Court. Moreover, this question fails to indicate the character of reasons which merit consideration for certiorari review, as set forth in Rule 17 of the Rules of this Court.

The Fifth Circuit determined that any award of attorney's fees would be carried with the case. *See* Chilton's Appendix A, *infra.* In its opinion, the Fifth Circuit resolved the issue by concluding that the attorney's fee award against Chilton, as generously assessed by the district court, would remain. 805 F.2d at 1266. A judgment incorporating the Court's award of attorney's fees was entered on April 3, 1987. *See,* Petitioner's Appendix A, at A-62.

When the final judgment was entered in this case, (and paid shortly afterwards), Pinner did not contest the amount of attorney's fees awarded. In fact, Pinner agreed as to all amounts to be awarded in the judgment, including not only the conditional remittitur, but also the amount of attorney's fees. *See,* Petitioner's Appendix A, at A-61. Pursuant to Pinner's request for the amounts to be awarded in the judgment and his unqualified acceptance of these amounts (*see,* Petitioner's Appendix A, at A-61), the district court entered judgment in Pinner's favor. This judgment consisted of $25,000.00 in compensatory damages derived from the conditional remittitur, court costs, accumulated interest, and $27,400.00 of attorney's fees. This judgment was signed and entered by the district judge on April 3, 1987. Pinner unconditionally accepted the benefits of this judgment, signed a satisfaction of judgment to that effect, and was paid $62,590.76. *See,* Satisfaction of Judgment as set forth in Chilton's Appendix B, *infra.* In view of the Fifth Circuit's decision and Pinner's election to accept Chilton's payment for all of his attorney's fees, Chilton submits that it is too late for Pinner to seek an increase in the award of attorney's fees.

Pinner failed to contest the amount of attorney's fees awarded when the final judgment was entered. He subsequently signed a satisfaction of judgment, which did not reserve that right. As the result of his own deliberate conduct, Pinner cannot seek to increase the circuit court's

assessment of attorney's fees through the instant petition for certiorari.

The satisfaction of judgment (Appendix B, *infra*) reveals that Pinner did not reserve a right to seek an increase in the award of attorney's fees, nor did he contest the amount awarded by the judgment. Indeed, even after the instant case was remanded to the district court, Pinner emphatically agreed as to *all* amounts to be awarded in the amended judgment, including the award of attorney's fees. *See,* Petitioner's Appendix A, at A-61. Pinner's unqualified acceptance of the benefits of the judgment, including the award of $27,400.00 of attorney's fees, precludes him from contending that the amount of attorney's fees was inadequate. Pinner chose not to question the award of attorney's fees nor did he reserve the right to attack the amount of attorney's fees before entry of final judgment in the courts below. Any right Pinner had to seek attorney's fees for work done in the appellate court was relinquished not only by his failure to contest the amount of attorney's fees awarded by the lower courts, but also by his subsequent execution of a satisfaction of judgment which did not reserve that right. Pinner's belated request for additional attorney's fees does not approach, much less cross, the threshold calling for an exercise of this Court's power of supervision, as set forth in Rule 17 of the Rules of this Court.

———o———

CONCLUSION

For the foregong reasons, Chilton respectfully submits that the Petition for Writ of Certiorari filed by petitioner Pinner should and must be denied.

Respectfully submitted,

HARRY A. ROSENBERG
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400 Poydras Street
New Orleans, Louisiana 70130-3245
Telephone: (504) 566-1311

Attorney for Respondent, Credit Bureau Services - New Orleans, d/b/a Chilton Corporation

———o———

CERTIFICATE OF SERVICE

I hereby certify that I have on this 5th day of June, 1987, served three copies of the foregoing brief in opposition upon the folowing, by placing same in the United States mail, properly addressed and first class postage prepaid:

(1) Counsel for Petitioner,
Edward K. Pinner, Sr., Esq.
511 Audubon Building
New Orleans, Louisiana 70112

(2) Counsel for Sherwin-Williams Company and James J. Schmidt,
Ralph Alexis, III, Esq.
Porteous, Hainkel, Johnson & Sarpy
704 Carondelet Street
New Orleans, Louisiana 70130

HARRY A. ROSENBERG

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3524

THOMAS K. PINNER,

Plaintiff-Appellee-
Cross-Appellant,

versus

JAMES J. SCHMIDT, THE SHERWIN-WILLIAMS COMPANY and CREDIT BUREAU SERVICES-NEW ORLEANS, d/b/a CHILTON CORPORATION, etc., et al

Defendants-Appellants-
Cross-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

(Filed June 2, 1986)

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

BY THE COURT

IT IS ORDERED that the motion of the appellee-cross-appellant to place this case on the summary calendar is DENIED.

IT IS FURTHER ORDERED that the motion of the appellee-cross-appellant for attorney fees for work done in appellate court, and the motion of the appellee-cross-appellant for damages for delay and double costs, are each and both carried with the case.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THOMAS K. PINNER	*	
	*	
VERSUS	*	CIVIL ACTION
	*	
JAMES J. SCHMIDT, THE SHERWIN-WILLIAMS COMPANY, AND C.B.M. OF LOUISIANA, INC., D/B/A CREDIT BUREAU SERVICES-NEW ORLEANS, A/K/A CHILTON CORPORATION	*	NO. 84-2059
	*	SECTION "A"
	*	MAG. DIV. 3

SATISFACTION OF JUDGMENT

(Received April 6, 1987)

TO: Ms. Loretta G. Whyte
Clerk of Court
United States District Court
Eastern District of Louisiana
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

NOW INTO COURT, through undersigned counsel, comes plaintiff, Thomas K. Pinner, who certifies to the Court that the Judgment rendered herein on April 3, 1987, in favor of plaintiff has been paid in full by Chilton Corporation and undersigned counsel does hereby authorize the Clerk of Court to note "Judgment Satisfied" on the docket sheet as provided in Rule 19.3 of the Local Rules for the Eastern District of Louisiana.

New Orleans, Louisiana, this 6th day of April, 1987.

Respectfully submitted,

/s/ Edward K. Pinner, Sr.
EDWARD PINNER
511 Audubon Building
New Orleans, Louisiana 70112
Telephone: (504) 522-2414

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I have on this 6th day of April, 1987, served a copy of the foregoing pleading upon counsel for defendant, Chilton Corporation, by hand delivery.

/s/ Edward K. Pinner, Sr.